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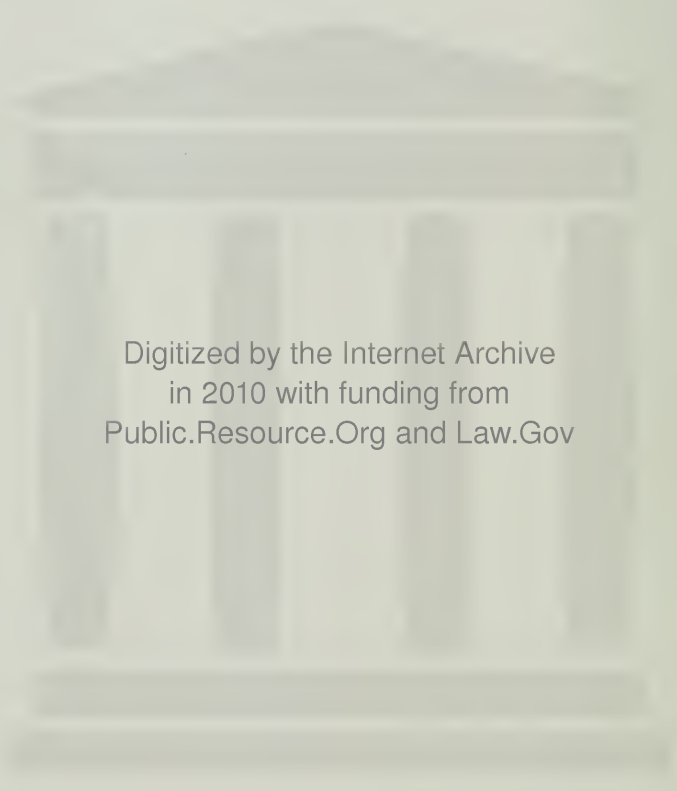
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United States
COURT OF APPEALS
for the Ninth Circuit

LEO ELWERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for
the District of Oregon.

Honorable William J. Lindberg, Judge.

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Portland, Oregon;

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NOV -8 1955



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United States
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LEO ELWERT,
Appellant,
vs.

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APPELLANT'S BRIEF

Appeal from the United States District Court for
the District of Oregon.

Honorable William J. Lindberg, Judge.

JURISDICTIONAL STATEMENT

On November 20, 1953, the Grand Jury handed down, and there was filed in the office of the Clerk of the United States District Court for the District of Oregon, an indictment containing three counts, each charging Appellant with violation of Section 145(b), Title 26 U.S.C.A., in the State of

Oregon and District of Oregon (Tr. of Rec. 1). On April 29, 1955, judgment was entered in said Court adjudging Appellant guilty of the offenses charged in said indictment, imposing on him a sentence of imprisonment for a period of eighteen months and to pay a fine of \$2500.00 (Tr. of Rec. 5).

The Court below had jurisdiction under **Section 3231 of Title 18 U.S.C.A.** and this Court has jurisdiction of the appeal taken from said judgment under **Section 1291, Title 28 U.S.C.A.**

STATEMENT OF THE CASE

The Indictment contains three counts charging that Appellant attempted to evade a part of the income tax owing by him to the United States for the tax years 1947, 1948 and 1949. He pleaded not guilty. A trial was had to the Court and Jury. Motions for judgment of acquittal as to each count were made and denied at the close of the Government's case and again at the close of the entire case. A verdict of guilty on all counts was returned and filed. A motion was renewed for judgment of acquittal after the verdict (Tr. of Rec. 38). The motion was denied (Tr. of Rec. 50). Judgment of guilty was entered on the verdict and sentence was imposed (Tr. of Rec. 51). Appellant appeals from that judgment.

The questions involved are:

- (a) The sufficiency of the indictment raised by motions to dismiss the indictment; by

objection to the introduction of evidence at the opening of the case; by motions for judgment of acquittal made at the close of the plaintiff's case and again at the close of the entire case and by motion for arrest of judgment.

- (b) Did the Court below err in denying defendant's motions for judgment of acquittal as to each of the counts of the indictment?
- (c) Did the Court below err in the instructions to the Jury?
- (d) Did the Court below err in refusing to give to the Jury the instructions requested by Appellant, numbered respectively, 1, 7, 10, 15, 18, 19, 20, 22, 23, 24, and 26?
- (e) Did the Court below err in the admission of evidence over the objection of the defendant?

SPECIFICATION OF ERROR NO. I

The Court below erred in denying Appellant's motion to dismiss the three counts of the indictment.

ARGUMENT

The sufficiency of each count of the indictment was challenged by motions to dismiss prior to the trial (Tr. of Rec. 5 and 7) by objection to the introduction of evidence (Tr. of Rec. 16 and Tr. of Test. 2); by motions for judgment of acquittal made at the close of the Government's case (Tr. of Test. 727 and Tr. of Rec. 30), and again at the close of the entire case (Tr. of Test. 844) and by motion for arrest of judgment after the return of verdict of guilty (Tr. of Rec. 37).

Each count charges violation of **Section 145(b)** of the Internal Revenue Code which, so far as material, provides:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony. . . ."

Re Counts I and II

Count I, so far as material, alleges:

"That on or about the 15th of March, 1948 . . . the defendant above named did willfully and knowingly attempt to defeat and evade a large part of the income tax owing by him to

the United States of America for the calendar year **1947 by filing** and causing to be filed with the Collector of Internal Revenue . . . a **false and fraudulent income tax return** wherein he stated that his net income for said calendar year was the sum of \$27,793.94 and that the amount of tax due and owing thereon was the sum of \$10,670.68, whereas, as he then and there well knew, his net income for said calendar year was the sum of \$39,822.86 upon which there was an income tax due in the amount of \$17,981.38. . . .”

Count II is the same as Count I except that it relates to the tax year **1948**. It alleges that the net income shown on the return was \$27,015.34 and the tax due thereon was \$5,583.76, whereas, the net income was \$48,731.82 and the income tax due was \$15,919.48.

We submit that these two counts fail to state an offense because there is no allegation that the returns for the tax years 1947 and 1948 were filed with the **intent** to defraud the United States.

It is now settled beyond question that the **specific intent to defraud** the United States is an essential element of the offense defined by Section 145(b) of the Internal Revenue Code.

Bloch v. United States, 221 F. 2d 786 (Ninth Cir.).

Wardlaw v. United States, 203 F. 2d 884 (Fifth Cir.).

Since the specific intent to defraud is an essential element of the offense, such **intent must be alleged** in the indictment.

In **United States v. Raymond**, 37 F. Supp. 957, the Court held:

“The criminal **intent** of the accused **must be alleged** where the criminality of the act depends on the intent with which it was done.’

27 Am. Jur. pp. 631, 632.

‘Intent is always vital when fraud is in issue.’ **United States v. Shurtleff**, 2 Cir., 43 F. 2d 944.” (Emphasis supplied).

In **United States v. Green**, 136 Fed. 618-652, the Court held:

“Where **intent** is of the essence of the offense attempted to be charged, it **must be set out in the indictment**. If not set out, the indictment is not good. **United States v. Cruikshank**, 92 U.S. 542, 23 L. Ed. 588.” (Emphasis supplied).

This decision was affirmed by the Supreme Court of the United States, 199 U.S. 601, 26 S. Ct. 748, citing many cases.

The element of specific intent to defraud cannot be incorporated into the indictment by implication or intendment.

In **United States v. Hess**, 124 U.S. 483, 8 S. Ct. 571, the Supreme Court held that,

“The general, and with few exceptions, . . . the universal, rule, . . . is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission **cannot be supplied by intendment or implication**, and the charge must be made **directly**,

and not **inferentially, or by way of recital.**"
(Emphasis supplied).

The bare allegation that defendant knew that his net income and tax liability were in excess of the amount stated in the return, does not supply the requirement of allegation of specific intent to defraud.

In **Morissette v. United States**, 342 U.S. 246, 72 S. Ct. 240, the Supreme Court said:

"Knowledge, of course, is not identical with intent. . . ."

In **Elder v. United States**, 142 F. 2d 199 (9th Cir.), the Court held:

"Appellee argues that where the indictment is couched in the terms of the controlling statute and where a purely statutory crime is involved, an allegation in the language of the statute which is fully descriptive of the offense is sufficient. (Citing cases). The rule as stated by appellee, however, is subject to the qualification that if the statutory definition of a crime is so general that a pleading in its terms will not serve the purposes of an indictment, then the offense must be stated with greater particularity. *United States v. Hess*, 124 U.S. 483; *United States v. Carll*, 105 U.S. 611; *Foster v. United States*, 9 Cir., 253 F. 481."

Section 145(b) of the Internal Revenue Code comes within the qualification referred to by the Court. The language of the Act is so general that a pleading in the bare terms of the Act would be insufficient to constitute an indictment. Since spe-

cific criminal intent is the very essence of the offense contemplated by the statute, the indictment must charge the existence of that specific intent.

Re Count III

Count III of the indictment, so far as material, alleges:

“That during the calendar year 1949 Leo Elwert, the defendant above named, . . . had and received a net income of about \$9,007.81; that upon said net income he owed to the United States of America income tax of \$1,669.00. . . .; that well knowing the foregoing fact, the said Leo Elwert, the defendant above named, on or about the 15th of March 1950 . . . did willfully and knowingly attempt to evade and defeat the said income tax by . . . **failing to make such income tax return** to the Collector of Internal Revenue . . . and by failing to pay to said Collector . . . said income tax **and by concealing and attempting to conceal** from all proper officers of the United States of America his true and correct gross and net income for said calendar year 1949. . . .”

What has been said with respect to the absence of any allegation of **intent to defraud** in Counts I and II of the indictment, applies equally to Count III because there is no allegation in that count that the failure to file the return was with the intent to defraud the Government.

Failure to file a return does not constitute an attempt to evade the tax, and is not a violation of **Section 145(b)** (a felony) of the **Internal Revenue Act.** (*Spies v. U. S.*, 317 U.S. 492, 63 S. Ct. 364.)

Failure to file a return may be a violation of **Section 145(a) of the Internal Revenue Code**, (a misdemeanor) subject to a different penalty and to a different statute of limitations.

In the case at bar, a prosecution for violation of **Section 145(a)** for failure to file a return was barred by the three-year Statute of Limitations when the indictment was returned. The limitation for prosecution for violation of Section 145(b) is six years. The return for the tax year 1949 had to be filed on or before March 15, 1950. The indictment was returned on November 20, 1953, more than three years after the alleged commission of the offense under Section 145(a). (**Section 3748 (a) Internal Revenue Code, now Section 6531 of the Internal Revenue Code of 1954**).

In the **Spies v. United States** case, the Court held that mere willful failure to file a return and willful failure to pay tax (a misdemeanor) does not constitute an attempt to evade income tax (a felony) without allegation of **affirmative acts** showing that the failure was actuated by an evil motive to evade the tax. The Court said:

“We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues Congress intended some willful **commission** in **addition** to the **willful omissions** that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and

positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.”

In **Jones v. United States**, 164 F. 2d 398 (Fifth Cir.), the Court held:

“In the Spies case, the Supreme Court, pointing out with admirable clarity and correctness the nature of the accusation pressed in this case and of the evidence required to establish guilt of it, has left in no doubt the right of a defendant so charged to have his defenses clearly and fairly put. Definitely settling that the mere failure to return income and pay the tax on it, though the taxpayer knew that it was due, would not constitute the offense of wilfully attempting to defeat and evade the income tax and stating that something more than this must be shown, . . .” (Emphasis supplied).

Appellee contended, and the Court below held, that Count III was sufficient under Section 145(b) because of the inclusion of the phrase:

“and by concealing and attempting to conceal . . . his true gross and net income for said calendar year 1949 . . .”

We submit that the inclusion of this phrase was insufficient to convert the offense from a misdemeanor under 145(a) to a felony under 145(b) and make applicable a longer statute of limitations.

First: There is no allegation to show the manner or the means by which concealment was accomplished other than the bare fact that the return was not filed. The allegation that defendant con-

cealed or attempted to conceal without any facts, constitutes a **conclusion** merely.

In **United States v. Fuselier**, 46 F. 2d 568, the Court held:

“The first count alleges that the several defendants, some of whom were the bankrupts, and other outside persons **did conceal** from the trustee certain property belonging to the bankrupt estate. . . .”

.

“This count merely charges the **legal conclusion** that the defendants did conceal the property described plus the **further legal conclusion** that it was the land embraced in the pretended act of sale . . . to the fictitious corporation. There is **no allegation of fact as to what was done to conceal** the property or as to why or how the transaction was pretended or the corporation fictitious. My view is that this does not state any fact upon which the Government could introduce proof to show the circumstances necessary to constitute an offense for the simple reason that they have not been alleged. In other words the count contains nothing but **legal conclusions** and for that reason is **insufficient** in law to compel the defendants to meet them as a criminal charge.” (Emphasis supplied).

Second: It does not allege the commission of any “affirmative act” or “positive act” of the character referred to by the Supreme Court in the **Spies case**, which the Court held was essential to a charge of tax evasion as distinguished from failure to file a return.

Third: At best, the word “conceal”, standing alone without allegation as to the manner in which

concealment was accomplished, is an **equivocal term** because concealment may be accomplished by “affirmative” acts and may be accomplished by “inactivity” or silence, and as has already been pointed out in the **Spies case** and in the **Jones case**, “mere passive inaction” does not constitute evasion under Section 145(b). “Willful but passive neglect of the statutory duty”, does not constitute tax evasion.

As was said in the **Spies case**:

“The difference between the two offenses, it seems to us, is found in the **affirmative action** implied from the term ‘attempt’, as used in the felony subsection.”

In **Bratton v. United States, 73 F. 2d 795** (Tenth Cir.), the Court held that in order to charge “concealment”, indictment

“must allege something more than mere failure to disclose—some **affirmative act** of concealment, such as suppression of the evidence, harboring of the criminal, intimidation of witnesses, or other **positive act** designed to conceal from the authorities the fact that a crime had been committed.” (Emphasis supplied).

The word “conceal” or “attempt to conceal”, used in the indictment, is not an allegation of the affirmative action within the purview of the Supreme Court’s decision in the **Spies case**.

The Supreme Court rejected the idea that “attempt” may be found on the basis of “inactivity” or on “refraining to act.”

We submit that the inclusion of the phrase, "conceal or attempt to conceal," in Count III of the indictment, was merely an adroit maneuver by the Appellee to avoid the plain rules of law laid down by the Supreme Court in the Spies case, to accomplish an enlargement of the statute of limitations and the conversion of a misdemeanor into a felony.

SPECIFICATION OF ERROR NO. II

The Court below erred in denying defendant's motions for judgments of acquittal as to each of the counts of the indictment.

ARGUMENT

Summary of the Argument

A

The evidence was insufficient to warrant submission of the case to the jury because it does not support a finding of guilt beyond a reasonable doubt as to any of the counts of the indictment.

B

All evidence of suspicious circumstances was dissipated by exculpatory evidence which is part and parcel of the Government's case.

C

There is no evidence to sustain a finding of fact beyond a reasonable doubt that defendant had **knowledge** that the returns for the years 1947 and 1948 (Counts I and II) were false when filed.

D

There is no evidence to sustain a finding of fact beyond a reasonable doubt that defendant filed or caused to be filed the returns for 1947 and 1948 (Counts I and II) **wilfully and with the specific intent** to defraud the Government.

E

There is no evidence to sustain a finding of fact beyond a reasonable doubt that the defendant **actually owed** the Government any **tax in excess** of amount shown on his returns for the tax years 1947 and 1948 (Counts I and II). The evidence establishes affirmatively as part of the Government's case that defendant failed to take allowable deductions in each of said tax years in amounts which more than offset the alleged increase in tax liability asserted by the Government.

F

The evidence introduced by the Government as part of its case, establishes affirmatively that many of the alleged inaccuracies in the returns, both of income and allowable deductions, were due to carelessness, negligence, incompetance and indifference of defendant's accountants and to carelessness and negligence and ignorance on the part of defendant, and not the result of intent to evade the tax.

G

There is no evidence sufficient to sustain a finding of fact beyond a reasonable doubt that the fail-

ure of defendant to file a return for the tax year 1949 (Count III) was with the specific intent to evade payment of this tax liability.

H

The Government's evidence establishes affirmatively that the failure to file a return for the tax year 1949 (Count II) was due to carelessness, negligence and indifference of defendant's accountant who was entrusted with the duty of preparing returns for defendant and causing them to be filed.

I

The Government's evidence establishes affirmatively that defendant's accountant prepared the return for the tax year 1949, but did not deliver the same to defendant for signature and filing; that the accountant retained the same in his possession and it was found in the possession of the accountant by the Internal Revenue Agents. He did not testify how it came into his possession.

J

There is no evidence that the defendant was aware that the return for the year 1949 had not been filed.

K

The **return** prepared by the accountant **for** the tax year **1949**, but not signed or filed **shows** that there was **no tax liability** for that tax year which negatives any inference that the failure to file said return was with intent to evade the tax.

L

The evidence was insufficient to sustain a finding of fact beyond a reasonable doubt that the defendant had any taxable net income and owed any tax for the tax year 1949. On the contrary, the Government's evidence establishes affirmatively that he did not have any taxable net income in said tax year. (Count III).

M

The evidence fails to support a finding beyond a reasonable doubt that defendant committed any "affirmative" act constituting attempted evasion or concealment with respect to his income tax liability for the tax year 1949 within the purview of the **Act (Spies case)**.

N

The failure to file a return, even if wilfull, does not constitute an attempt to evade the tax and violation of **Section 145(b) of the Internal Revenue Act (Spies case)**.

O

The unsigned and unfiled tax return prepared by the accountant, for the tax year 1949, was an insufficient and improper basis to be used as a starting point for the computation of taxable net income and tax liability for said tax year, especially in view of the gross inaccuracies (overpayment of gross income by \$19,000.00 to \$20,000.00) in said prepared return admitted by the Government's witnesses.

Preliminary Statement of Facts Applicable to All Three Counts

The facts hereafter narrated were established by the testimony of the Government's witnesses as a part of the Government's case and were in part corroborated by evidence introduced in the defendant's case.

Defendant is a farmer, approximately 50 years of age. He was born and has lived all his lifetime in the vicinity of Sherwood, Oregon, a small town in the Tualatin Valley. His schooling consisted of attendance at grade school for five or six years (Tr. of Test. 783). He engaged in farming and raising nursery stock all his lifetime (Tr. of Test. 775).

During the years in question and for about twenty years prior thereto, defendant and his wife, Mary, engaged in the farming and nursery business as co-partners under the trade name of "Tualatin Valley Nursery Co." Over the years, they accumulated and operated a number of farms on which were raised nuts, cherries, prunes, nursery stock, and other farm products. These farms were not contiguous. They were scattered over a considerable radius from the home place. In the conduct of the operations, defendant devoted his time and attention to the farming operations consisting of the planting and cultivating, pruning, harvesting nursery stock and other farm products, which kept him out in the fields all of the time, while his wife, Mary, attended, to a large extent, to the business

phases of the operation. She looked after the banking. The bookkeeping, such as was maintained, was done by her and under her supervision at the home place in an office maintained at the nursery. They did mostly what is known as a mail-order business. A small part of their business was transacted at the place of business.

During the years in question and for some years prior thereto, they maintained three bank accounts; one account at the Sherwood Bank in which they deposited money orders received in the mail. Two accounts were maintained at the Tigard Branch of the United States National Bank of Portland, one under the name of "Tualatin Valley Nursery Co." and one, "Real Estate Account." Checks received in payment of farm products which they sold, were deposited in the Tualatin Valley Nursery Co. account. Up to the fall of 1946, defendant and his wife both drew checks on those accounts.

In the fall of 1946, defendant became involved in serious domestic difficulties by reason of an affair with a married woman. The husband of this woman, one named Bloomquist, through attorneys, made demands for about \$30,000.00 damages for the alienation of his wife's affections (Tr. of Test. 211). By reason of these threats, defendant's wife, Mary Elwert, drew out substantially all of the monies on deposit in the Tualatin Valley Nursery account and transferred the same to an account in her own name and the business of the Nursery was

thereafter transacted through that account. The defendant could not draw checks on that account. A small account was opened, called "Labor Account" in which small sums of money were deposited to meet checks drawn to laborers. Defendant could draw checks on that account for that purpose only. As the trouble brewed and progressed, defendant's wife directed the Sherwood Bank not to honor any checks drawn by defendant.

In the fall of 1946, Bloomquist commenced an action in the Circuit Court of the State of Oregon for damages for alienation of his wife's affections. Defendant was represented in that action by Attorneys named Asbahr, Hanley and Bernstein.

In the fall of 1948 defendant went to Idaho, established a residence and brought suit for divorce against his wife. A decree of divorce was entered in June or July of 1949. During that period of time, Mary Elwert handled all the financing.

The relations between the husband and wife became very antagonistic and defendant left the home and lived elsewhere, but continued to give attention to the farming operations. He had little or nothing to do with the business operations carried on at the office or the home place and was seldom there. He exercised no supervision or control over the bookkeeping at the office.

As a result of the dissension, litigation, the appropriation of the bank accounts by defendant's wife, defendant found it difficult to carry on any

business or to maintain any bank accounts. He feared seizure and appropriation by his wife of his funds.

In the operation of the farms, he constantly needed large sums of money in cash for the payment of itinerant labor that had to be paid daily **in cash**. He expended over \$20,000.00 in each year in such cash payments. He also had been in the habit, during all of the years, of making many purchases for the business and paying therefor **in cash**. He rarely took any receipts for such cash payments. These ran into many thousands of dollars in each year.

Defendant kept no records of these cash payments for itinerant labor and other cash expenditures for the business with the result that they were not reflected in the books of account and were not reflected in the tax returns that were made from the books.

The accountants Cook, who made out the 1947 return, and Hammond, who made the 1948 return and prepared the 1949 return, both testified to defendant's carelessness in keeping records of business expenditures made in cash. They tried to persuade him to keep records, but were unable to do so with the result that the accountants gave no effect to these expenditures which would have been allowable deductions, and as will be later demonstrated, were greater in amount than the alleged tax deficiency.

The difficulties referred to above and the necessity of obtaining cash with which to meet these expenditures, caused defendant to resort to the practice of cashing some of the checks and disbursing the proceeds for such cash disbursements instead of following the normal course of depositing the checks in the business bank account.

In the Bill of Particular relating to each count, there is enumerated the specific items of alleged unreported (partnership) income. Some of the checks referred to therein were cashed and disbursed by defendant for business purposes as aforesaid, but a number of the large checks were deposited by the defendant in the bank account of the partners maintained at the Tigard Branch of The United States National Bank titled "real estate account" and if those items were not included in the income tax returns, it was due to the failure of the accountant to give effect to that bank account in preparing the income tax returns. The accountant Hammond, a witness for the Government, testified that he did not take into account the deposits in the "real estate account" in making the returns although he knew of the existence of that account.

The returns for the tax year 1947 was prepared by the accountant Cook, who was a former Internal Revenue Agent. The record shows that he was exceedingly careless, indifferent and incompetent in the preparation of that return. He made

no effort to ascertain the amount of cash expenditures made by the defendant for business purposes and to take the same as allowable deductions. He failed to take allowable deductions to the extent of over \$6,000.00 for income taxes paid to the State of Oregon by the partners, which was an allowable deduction for the tax year 1947 and he failed to take allowable deductions which will be demonstrated hereafter.

The return for the tax year 1948 was prepared by the accountant Hammond, the Government's witness, who was a former Deputy Collector of Internal Revenue, and who solicited the business of the Nursery. His evidence, likewise, establishes that he was grossly careless, incompetent and indifferent. In computing the receipts of the partnership, he only took into account the items appearing as deposits in the bank account of the Tualatin Valley Nursery at the Tigard Branch of The United States National Bank. He did not take into account the deposits made in the "real estate account."

In computing the deductions, he only gave effect to deductions represented by checks issued therefor. He knew that large sums of money were expended in cash for business purposes. He made no effort to ascertain the facts in respect thereto or give effect to such expenditures as allowable deductions. He failed to take numerous allowable deductions of large amounts to which defendant was entitled as a matter of law; for depreciation;

for capital losses; loss carry-backs, and the like, in many thousands of dollars, which will be later demonstrated.

If the allowable deductions had been taken, the return would have shown a loss instead of an additional tax liability of \$5,229.76 as testified to by the Government expert Mytinger.

A return for the tax year 1949 was prepared by Hammond for the partnership and for the individuals. These returns were never signed or filed. He testified that he brought the returns to the home of Mary Elwert a few days before the due date; that he left the returns with both Mary and Leo Elwert with instructions to sign them. His own testimony demonstrated the falsity of that testimony. The facts are established by the Government's testimony that the original documents purporting to be the partnership and individual returns, were found in the possession of Hammond by the Internal Revenue Agent Menlow. The Revenue Agent obtained those returns from Hammond and he had photostatic copies made of the returns. The returns were later returned by the Revenue Agent to Hammond and Hammond turned them over to defendant's accountant. It is obvious that he could not have left the returns with the defendant and his wife as he at first claimed he did.

Hammond was grossly incompetent, careless, or indifferent in the preparation of the 1949 returns. The Revenue Agent Menlow and Hammond, as wit-

nesses for the Government, both conceded that the partnership return showed partnership income of \$19,000.00 to \$20,000.00 in excess of the gross income reflected by the books and records. They were unable to reconcile the difference.

In that year, too, Hammond failed to take allowable deductions running into many thousands of dollars which, if taken, would have established a loss of many thousands of dollars instead of a tax liability of \$657.08 as testified to by the Government's expert Mytinger.

A

Re: Knowledge of Falsity of the 1947 and 1948 Returns

Assuming, without admitting, that the returns for the tax years 1947 and 1948 were false, there is no evidence in the record to support a finding, beyond a reasonable doubt, that defendant knew or was aware of the falsity.

The 1947 return was prepared by the accountant Cook (Government's witness). The 1948 return was prepared by the accountant Hammond (Government's witness).

Both accountants prepared partnership information returns and based thereon, they prepared defendant's individual returns.

The 1947 (Ex. 2, Tr. of Test. 22) partnership return, which is the basis of defendants individual

return, was **not signed by defendant**. It was signed by his wife, Mary Elwert, only. It was **erroneously admitted** in evidence over defendant's objection (Tr. of Test. 12, 13, 14, 20, 21, 22).

Both accountants merely testified that they prepared the returns, but gave no testimony as to how or under what circumstances, or when, they were signed. They did not even testify that they saw them sign the returns. They gave no testimony of any conversation with defendant or Mary Elwert relating to the returns regarding their contents or the basis upon which they were prepared, or how the information contained therein was obtained, or what was included or what was excluded. In short, there was no conversation at all of any kind which would throw any light upon the question as to the extent of defendant's knowledge as to the accuracy of the returns. There is no evidence that defendant examined the returns or any records at the time to ascertain the accuracy of the returns, or that any information of any kind was communicated to him as to the information contained therein.

Cook testified that he did not file the 1947 return; that "they picked them up." "I don't remember whether I gave it to Mary or whether I gave it to Leo." (Tr. of Test. 22). This is the sum total of Cook's evidence as to the circumstances surrounding the execution and filing of the returns for 1947.

Hammond merely testified that he prepared the 1948 return (Tr. of Test. 218).

There is no evidence that defendant filed or caused to be filed the 1947 and 1948 partnership and individual returns.

The evidence establishes beyond question that Leo Elwert had nothing to do with the keeping of any accounting records. There is not a scintilla of evidence that he knew what records the accountants used in making up the returns. There is no evidence that he was aware that the accountants had failed to take into account the bank accounts in the Tigard Branch of The United States National Bank (real estate account) in making up the returns, and there is no evidence that he was aware that they failed to take into account the many receipts which were in the files showing cash disbursements in taking allowable deductions.

There is not a scintilla of evidence that defendant knew, or from which an inference of knowledge can be drawn, of any falsity or inaccuracy in any of the returns. He was wholly ignorant of any inaccuracies therein.

Knowledge of the falsity of the returns is the very heart of the charge of attempted evasion, especially under the indictment in the case at bar which charged that the attempted evasion was accomplished by filing and causing to be filed a false and fraudulent income tax return and that he

“well knew” that his tax liability was greater than the amount reported in the return.

In **Direct Sales Co. v. United States**, 319 U.S. 703, 63 S. Ct. 1265, the Supreme Court held:

“Without the knowledge, the intent cannot exist. *U. S. v. Falcone*, 311 U.S. 205. Furthermore, to establish the intent, the evidence of knowledge must be clear and unequivocal.” (Emphasis supplied).

In a criminal case, there can be no such thing as **constructive knowledge**.

Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240.

Bloch v. United States, 221 F. 2d 786 (9th Cir.).

Where **specific intent** is the crux of the case, knowledge of the facts from which intent is to be determined, must be **actual knowledge** and **not constructive knowledge**, and that knowledge, as the Supreme Court said, must be established by clear and unequivocal evidence.

In **Hargrove v. United States**, 67 F. 2d 820 (5th Cir.), a prosecution for tax evasion, the Court reversed the conviction, holding:

“In the second class of cases, a specific wrongful intent, that is, **actual knowledge** of the existence of obligation and a wrongful intent to evade it, is of the essence.” (Citing numerous cases) (Emphasis supplied).

In the absence of **actual knowledge of understatement**, there can be no specific intent to evade.

In **Morissette v. United States**, 342 U.S. 246, 72 S. Ct. 240, the Court held:

“Knowledge, of course, is not identical with intent”

In **United States v. Litberg**, 175 F. 2d 20 (7th Cir.), the Court held:

“In other words, **an inference may not properly be relied upon** in support of an essential allegation **if an opposite inference may be drawn with equal consistency** from the circumstances in proof. In **United States v. Tatcher**, 3 Cir., 131 F. 2d 1002, 1003, the court reversing a conviction based on inferences stated: ‘To justify conviction of crime where the evidence relied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt. **United States v. Russo**, 3 Cir., 1941, 123 F. 2d 420. As we have seen, **the evidence** relied upon to sustain the defendant’s conviction is **as consistent with his innocence as with his guilt.**’

In **United States v. Russo**, 3 Cir., 123 F. 2d 420, 423, where knowledge was an essential element of the offense charged, it was held a **judgment could not be sustained where the inference of lack of knowledge was as readily deducible as that of knowledge.** See also **Isbell v. United States**, 8 Cir., 227 F. 788, 792; **Pierce v. United States**, 6 Cir., 115 F. 2d 399, 400; **Hammond v. United States**, 75 U.S. App. D.C. 395, 127 F. 2d 752, 753;

The scienter of the offenses charged is that the notes were passed or possessed ‘with intent to defraud and with knowledge that they were counterfeited,’ and **in the absence of proof of such intent and knowledge a judgment of conviction cannot stand.**” (Emphasis supplied).

With respect to the tax year 1949 (**Count III**), the attempted evasion is predicated on the **failure to file a return** and not on the charge of knowingly filing a false return as in Counts I and II.

Assuming, without admitting, that the failure to file a return would be a violation of Section 145(a) (misdemeanor) or 145(b) (felony), it would have to be established beyond a reasonable doubt that the failure to file a return was intentional and to be intentional, the **defendant must know and be aware of the failure to file a return** and that he failed to do so to accomplish the evil purpose of evading his tax.

The failure to file a return could be due to forgetfulness, through inadvertence, and other causes which would not be attributable to an intent to evade tax.

In the case at bar, there is no direct testimony as to why the 1949 return was not filed. Hammond testified that he prepared the partnership and individual returns and delivered them to Mary and Leo Elwert at their home. So far as his testimony is concerned, the record is silent as to what happened thereafter. There is no evidence of any conversations with defendant in which he gave any explanation as to the reason for the failure to file the return.

The Government's testimony establishes affirmatively that Hammond did not deliver the prepared returns to defendant. The Government's

evidence establishes that the original prepared returns were found in the possession of Hammond, the accountant, by Menlow, the Internal Revenue Agent; that he took possession of those returns along with all of the other records. Menlow caused photostat copies of these returns to be made and the originals, along with all the other records, were returned by him to Hammond who later surrendered them to defendant's accountant. This is the Government's testimony. Revenue Agent Menlow testified (Tr. of Test. 577) that he obtained these returns from Hammond; that he had photostat copies made under his direction and that the original returns were among the records that were turned over to him by Hammond. It is perfectly obvious that Hammond had not delivered the returns to defendant as he originally testified.

Hammond ultimately admitted that he turned over these returns to the Government. He testified (Tr. of Test. 228):

"Q. MR. MEAD: These returns were furnished by you to the Government for the purpose of taking these photostatic copies; is that correct?

A. Yes."

The least that can be said, is that Hammond prepared the returns at some time either before or after the due date, but neglected to deliver them to defendant for signature and filing. He obviously was mistaken in his belief that he had delivered the returns to the defendant, or deliberately tried

to shield himself from criticism by throwing the blame on defendant and his wife.

From all this, it is clear that the failure to file the 1949 return was the result of either carelessness, mistake or inadvertence on the part of the accountant and perhaps of the defendant. It certainly is not due to a motive to evade payment of income tax.

The tax returns which Hammond prepared disclosed that there was **no tax liability** and it is inconceivable that defendant would deliberately refuse or fail to sign and file the same for the purpose of tax evasion.

The evidence was insufficient to sustain a finding of fact beyond a reasonable doubt that defendant had **knowledge of the falsity of the returns** for the years 1947 and 1948, or that he had **knowledge** and was aware **that the return for the year 1949** had not been filed.

The motions for judgment of acquittal should have been granted on that ground.

B

There Was No Falsity in Fact in the 1947 and 1948 Returns Counts I and II

In a prosecution for attempted tax evasion, the existence of an actual tax liability, in fact, is the very heart of the case. There can be no tax evasion in the absence of an actual tax liability.

In the case at bar, the Government's case establishes that there was no tax liability, in fact, in excess of the amount reported in the returns.

The alleged excess tax liability, testified to by the Government's experts Menlow and Mytinger, was arrived at by computations which excluded many items of allowable deductions and items of loss, carry-back and carry-forward deductions. For the year 1949 the Government included an admitted overstatement of partnership income of \$19,000.00 to \$20,000.00.

The taking of these allowable deductions establishes a loss in each of the tax years instead of a tax liability.

There is conclusive evidence, which is part and parcel of the Government's case and supplemented by defendant's evidence, that large number of itinerant workers were employed during the tax years in question; that they were employed on a day to day basis; that they were **paid in cash** (not by check) **each day**; that no receipts were ever taken; that no record was ever made of these cash expenditures; that the cash with which to make these cash payments was obtained by defendant by cashing checks payable to the Nursery, either in payment of merchandise sold or in payment of the sale of real property, and that the remittances described in the Bill of Particulars purporting to be unreported income (except those which were deposited in the Firm's bank account) were con-

verted into cash and used to make the cash disbursements. These cash expenditures were not reflected in the tax returns.

C

Testimony Relating to Expenditure of Cash for Itinerant Labor

Government's witness Cook was aware that itinerant labor was used (Tr. of Test. 62); and that defendant did pay some Mexican labor and people of that nature directly (Tr. of Test. 63). He testified:

"And I know I asked him several different times, or told him that he should have a slip for them to sign. He said, 'Well, they can't even sign their name.' I said, 'Well, they can at least make an X for that, which will give me a basis on which to put that down as an expense. But that was another thing that I couldn't get him to do. He was too busy.'" (Tr. of Test. 63).

Cook explained to defendant the importance of keeping the cash record and how it would affect him and that he "would need it if deductions were to be taken, and otherwise they would be lost." He testified:

"Q. And he explained to you that as to these cash payments to laborers some of them could not read or write?

A. That is right.

Q. And it would be a great deal of difficulty to get them?

A. That is right." (Tr. of Test. 64).

Government's witness Schmidt testified that he cashed checks for defendant; that he usually brought a lot of small checks after banking hours for cashing and then the next day he gave defendant the money (Tr. of Test. 159). He received the check from defendant for \$12,750.00 (one of the items of alleged unreported income) and issued a number of checks for smaller amounts at different dates (Tr. of Test. 163), which were cashed. He did that as an accommodation to defendant (Tr. of Test. 164). He testified:

"Q. What was his reason?

A. He wanted the check divided into smaller amounts so he could take care of some Winos and help he had." (Tr. of Test. 164).

Schmidt cashed the checks and gave defendant the cash (Tr. of Test. 165). He testified:

"Q. Now I think you stated, Mr. Schmidt, that from time to time you were in the habit of cashing checks for Leo Elwert on your direct examination; is that right?

A. That is right.

Q. And I think you further made the statement that you cashed the checks because he was in need of getting funds to take care of Winos and labor. Will you explain what you mean by Winos, Mr. Schmidt.

A. Well, I suppose it was a bunch he picked up down in skid row. He sent in a truck or two trucks a day for help, and the way I understand he had to pay them in cash, so he required money every day to take care of that itinerant help.

Q. Was this particularly during the harvest season and the planting season of the year?

A. Yes." (Tr. of Test. 188-189).

Defendant's witness Helvie testified that she did office work for the Nursery (Tr. of Test. 731). Many itinerant workers were employed during the years 1946 to 1949 to do harvesting work during the reasons of harvesting and of cultivating and planting (Tr. of Test. 731) and especially during the nut and prune harvest times in the fall of the year.

“They brought them in on a truck and the truck would be full.”

They were paid by cash,

“because they seldom ever had the same men two days in a row.”

No records were kept of the cash payments to the itinerant help and no payroll records were kept (Tr. of Test. 732). The men were paid by Leo and by Mary both. They would be loaded on trucks and taken back to town. She did not know where the money came from that the men were paid with (Tr. of Test. 733).

Defendant's witness Hull testified that he worked for the Nursery; drove a truck and did field work. He was one of the regular employees of the Nursery (Tr. of Test. 741). During 1947, 1948 and 1949, during the harvesting and planting seasons, he picked up itinerant workers for the Nursery down at Sixth and Burnside Streets in Portland (Tr. of Test. 742). He would pick up as many as the truck would hold. In the harvest season, their services were required for a month or

two and maybe longer. He hauled the men to the various farms (Tr. of Test. 742). The men were paid mostly in cash. No receipts or records were made with regard to those payments. Payments were made by defendant and by the witness and by one Francis Mendel, the field boss (Tr. of Test. 743).

Defendant's witness Cornett testified that he was in the employ of the Nursery from 1945 through the middle of 1947. He drove the truck and tractor. During the cherry crop time, he would go to Portland and pick up help by the truck load. He would take them out to the cherry fields, pay them off in the evening, and haul them back to Portland. He also brought more to other fields operated by the Nursery (Tr. of Test. 748). During the cherry picking time, he had seventeen to eighteen men a day. He paid them in cash. He got the cash from defendant (Tr. of Test. 749). He did not take any receipts from the men. The same practice was followed with respect to the filbert crop and the walnut crop (Tr. of Test. 750-751). The pickers were paid by the box for the cherries (Tr. of Test. 754).

Defendant's witness Farmer testified that he worked for the Nursery. He did field work from 1945 to 1952. He was a regular employee. He observed the employment of itinerant labors during 1947, 1948 and 1949 during the spring and fall seasons of the year (Tr. of Test. 770). He observed

that the laborers were paid in cash; that no records or receipts were made. These cash payments were made by Francis Mendel, the foreman, and by defendant (Tr. of Test. 772).

Defendant's witness Meyer testified that he worked for the Nursery. He was familiar with the practice of hiring itinerant help. On a few different occasions, he took his truck to an employment office in Portland about half past six o'clock in the morning. **He loaded twenty-five to twenty-six men on the truck** (Tr. of Test. 776). He saw a lot of different gangs on different places at different times. In the nursery business, **this was common practice** (Tr. of Test. 777). The men were paid mostly in cash by Francis Mendel.

Defendant's witness Mendel testified that he was employed by the Nursery for about twenty years. He was a field foreman (Tr. of Test. 787). He described the number of farms and nurseries that were operated during 1947, 1948 and 1949; that itinerant labor was employed in connection with these operations (Tr. of Test. 793). The harvesting was done principally by the itinerant labor (Tr. of Test. 795). They were paid "so much a lug." **They usually brought in two truck loads of men** and defendant would bring out as many more as he could get in his pickup truck (Tr. of Test. 796). They usually hauled about **twenty-five men to a truck** and they would bring in between sixty and seventy people at a time during the harvest

(Tr. of Test. 796). The itinerant labor was paid in cash "when you took them back at night" (Tr. of Test. 796). If you did not pay them in cash, they would not come back. "They come out and work one day, and the next day you get a new load altogether." (Tr. of Test. 796). "Those people will just work a day or two at best." **This was common practice followed by the farmers in that part of the country** (Tr. of Test. 797).

For the nut harvesting, the men were paid on a poundage basis. The cherry pickers were paid about the same way. Each night they weighed in the amount that each one picked and he was paid. The harvest of the **cherry crops usually took from twenty to thirty days** (Tr. of Test. 798). He paid the cherry pickers himself. He also paid the itinerant workers for the nursery work (Tr. of Test. 799). In the spring, the operations were about the same way (Tr. of Test. 799). In the **work of pulling nursery trees**, they usually **employed about twenty-five to thirty itinerant** workers during the years 1947, 1948 and 1949. He paid them off each night (Tr. of Test. 800). The payments were nearly always in cash. For a while he took slips of paper on which the men signed by making their mark. When he brought them to the office, the bookkeeper would ask, "what am I going to do with these?" Sometime he left them at the office and sometime he threw them away (Tr. of Test. 801). No payroll books were kept of these itinerant laborers and no record was kept of the cash payments. The

itinerant laborers demanded cash. It was easier to pay them in cash than to fool around with checks. The men demanded cash because they had trouble cashing checks (Tr. of Test. 802). **He got the cash with which to pay the men from the defendant** most of the time. He never signed any receipts for the money. He just picked up the money from the defendant and would go out and pay off the field crews (Tr. of Test. 803). **Each crop would last around twenty to thirty days and followed each other.**

Nellie Elwert, defendant's sister-in-law, testified as a witness for defendant. She and her husband, defendant's brother, are engaged in farming in the same vicinity as defendant and she had charge of recruiting itinerant labor for their farm (Tr. of Test. 809, 810). She was familiar with the employment of itinerant labor at the Tualatin Valley Nurseries. She was employed by the Nursery to get laborers during the nut and fruit harvest and nursery operations (Tr. of Test. 810). She went to the employment agency in Portland and supervised the loading of trucks with itinerant workers. She fixed lunches for them. She would be down at the employment office about 4:30 or 5:00 o'clock in the morning. She would bring them back about 4:00 o'clock in the afternoon. **The practice was to pay these workers in cash.** They could not get help unless they did pay in cash. The men would have trouble cashing the checks. (Tr. of Test. 812). She paid them each night. She got dif-

ferent people all the time. Some times she got the same person under several different names (Tr. of Test. 814). The average pay of laborers was about six to seven dollars a day or about 75¢ an hour (Tr. of Test. 815).

There can be no question under this record, coming from the Government's, as well as defendant's, witnesses, that large numbers of itinerant workers were employed during the tax years in question, as many as sixty to seventy a day; that they were employed over long periods of time during the spring and fall months of the year; that they were paid in cash; that no records were kept and that these expenditures, which ran into thousands of dollars, constitute legal allowable deductions. There is no evidence to the contrary.

It is, of course, impossible to make an accurate computation of the amount of money so expended in each of the tax years.

But a fairly accurate estimate of the amount can be made sufficient for the purpose of determining whether the amounts so expended would affect the realization of the net income during the years in question.

The record establishes at least the following **minimum cash expenditure for itinerant workers:**

Nursery Workers (Spring work and harvesting):

65 days X 25 men @ \$5.00 per day... \$ 8,125.00

Nut Harvest:

30 days X 50 men @ \$5.00 per day....	7,500.00
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Cherry Harvest:

20 days X 20 men @ \$5.00 per day....	2,000.00
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Prune Harvest:

30 days X 25 men @ \$5.00 per day....	3,750.00
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Total annual **minimum expenditure**

in cash for itinerant labor.....	\$21,375.00
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This sum was a proper lawful allowable deduction in each of the three tax years, which was not taken into account by the accountant who prepared the returns, and was not given any effect in the computations of alleged tax liability made by the Government's expert witnesses Menlow and Mytinger.

The record establishes beyond question that the only labor that was taken as a deduction in the tax years, were the amounts paid to regular employees by check and these amounts were taken by the accountant from the record kept for the State Industrial Accident Commission. In that record, only the monies that were paid by check to regular employees was entered and these are the only deductions taken in the income tax return.

Allowance of a deduction in each of the tax years in question for this itinerant labor more than wipes out all of the alleged unreported net income and also wipes out the income reported on the income tax returns.

Re 1947

Count I of the indictment charges that the tax liability for 1947 was under-stated in the amount of \$7,310.70

The under-statement of tax liability for 1947, as computed by the Government's expert Mytinger, without giving effect to the aforesaid expenditures for itinerant labor and other allowable deductions hereinafter referred to, was the sum of **\$5,229.76**, the difference between the tax liability of \$15,900.-44 computed by him and the tax liability shown on the return of \$10,670.68. This increase in tax liability was based upon an alleged increase of \$8,709.62 in net income as computed by the Government's expert (Tr. of Test. 703) being the difference between \$36,503.56 net income computed by the expert and \$27,793.94 reported by the taxpayer in his return.

**Summary of Allowable Deductions
Not Taken in 1947 Partnership
and Individual Returns**

- (a) **\$ 3,093.75:** In 1947, defendant paid this sum to the Oregon State Tax Commission on his **individual** 1946 tax liability (Tr. of Test. 45, 604, 612-614, 703, and Def. Exh. 111, checks totaling twice that amount being the tax payment for both partners). There was no deduction taken for this item (Exh. 2), (Tr. of Test. 601).

- (b) **\$20,000.00:** Payments in excess of that amount to itinerant laborers in cash for which no record was maintained as heretofore demonstrated.
- (c) **\$ 3,429.25:** Payment in cash to Progressive Printing Co. for printing catalogs (Tr. of Test. 760, 761, Exh. 106). The Revenue Agents found the receipted bills showing payment in cash in the records (Tr. of Test. 583).
- (d) **\$. 500.00:** Paid to Progressive Printing Co. for purchase of print paper (Tr. of Test. 756-757).
- (e) **\$ 270.00:** Loss of \$540.00 was sustained on the sale of 99 W Motel (depreciable business property), allowable in full if not offset by capital gains under **Section 117(j) of the 1939 Internal Revenue Code** and amendments thereto. The accountant erroneously took a deduction of \$270.00 only (Tr. of Test. 42) (Exh. 2).
- (f) **\$ 275.00:** Loss on the sale of an army truck was \$550.00. Only \$275.00 was taken as a deduction in the return (Exh. 42) (Tr. of Test. 42). The full amount of the loss was deductible because the army truck was depreciable business property used in the business. **Section 117(j) of the Internal Revenue Code and Amendments thereto.**
- (g) **\$ 1,500.00:** Loss on worthlessness of Lester McConkey note which became worthless in 1947. The loss was \$3,000.00. The accountant took a deduction of \$1,500.00 only (Exh. 2)

(Tr. of Test. 43, 722). The loss is deductible as a non-business bad debt. (Section 23(k), Internal Revenue Code) and taxpayer was entitled to take the loss deduction as a short-term capital loss under **Section 117(a)(2), Internal Revenue Code, 1939.**

- (h) \$.....: **Cash payments** for business expenditures for which there were receipts in the files of the Nursery (Tr. of Test. 686, 581, 582, 590). The amount is not ascertainable, but the evidence discloses that it ran into a great deal of money. These were not taken into account (Tr. of Test. 590-592).
- (i) **\$15,494.65:** The record establishes, when all deductions are properly allowed and overstatement of income is given effect for the year **1949**, the partnership sustained a loss in 1949 of \$30,989.31. One-half of this loss is allowable as a deduction as a net operating loss carry-back on the individual return of defendant for the year **1947** (Section 122 of the 1939 Revenue Code and amendments) (see computation, Appendix pp. 1 and 2).

The only deductions allowed by Government's expert Mytinger in his computation, are the items e (\$270.00) and f (\$275.00) (Tr. of Test. 699-670).

There is additional evidence of expenditures made in cash for which no record was made for tires, repairs, gasoline, and other expenditures totaling several thousands dollars (Tr. of Test. 581,

589, 752, 780, 782), which were not taken as deductions.

There is conclusive evidence in the record that additional cash expenditures were made for which receipts were taken. Those receipts were found in the records in the possession of Hammond and later turned over to the Internal Revenue Agents. Neither the accountant, in preparing the return, nor the Government's expert in making his computation, gave effect to any of these cash disbursement.

Consideration of all of this testimony, all of which appears in the record as a part and parcel of the Government's case, demonstrates that defendant had not understated and underpaid his tax liability for the year 1947. On the contrary, he had greatly overpaid his tax liability for that year.

E

Re 1948

Count II of the indictment charges that defendant understated his tax liability for that year in the sum of \$10,335.72.

The Government's experts computed the understatement of the tax liability for 1948 to be **\$623.81**, giving effect to certain deductions which the income tax return did not reflect. This tax liability was computed by the expert as follows:

He determined a total partnership tax liability for the tax year 1948 based upon the joint return of the husband and wife to be \$6831.38, whereas, the joint return showed a tax liability of \$5,583.76, making an increase in the joint tax liability of \$1,247.62 and an increase in defendant's individual tax liability of \$623.81 (Tr. of Test. 709-710).

This additional tax liability of \$623.81 was based upon an alleged increase in net income of the partnership computed by the expert Mytinger in the sum of \$3,422.33, being the difference between the partnership net income of \$28,745.07, computed by the expert (Tr. of Test. 709), and \$25,322.74 reported in the return, making the difference of \$3,422.23.

This computation did not give effect to the allowable deductions shown in the following summary:

**Summary of Allowable Deductions
Not Taken in 1948 Partnership
and Individual Returns**

- (a) \$ **770.05**: Paid to Progressive Printing Co. for printing catalogs (Exh. 106-107, Tr. of Test. 760, 762, 781). The receipted bills (Exh. 107) showing payment **in cash** was found by the Revenue Agent in the records.
- (b) \$**20,000.00**: Payments in excess of that amount made to itinerant laborers in cash for which no record was maintained as heretofore demonstrated.

- (c) **\$22,000.00:** Loss sustained in 1948 on loan to Denton Construction Co. determined to be worthless (Tr. of Test. 495 to 499, 707). This loss was deductible as a short-term capital loss in full under **Section 23(k)(4) of the 1939 Internal Revenue Code** against one-half of the capital gain realized on the sale of timber lands to Dant & Russell (Coos Pacific Timber Co). \$1,000.00 of the excess capital loss was also deductible against ordinary income for the year 1948. The excess of this loss over the capital gains in that year, are allowable as deductions against capital gains in the subsequent year 1949 and later years.
- (d) **\$ 4,250.00:** In 1948, capital stock of Producers Gas & Oil Co. became worthless. The purchase price of the stock was \$8,500.00. This was a long-term capital loss, one-half of which was deductible against capital gains received in the same year. Accountant Hammond took, as a deduction, only \$1,000.00 against ordinary income (Exh. 43). One-half of the capital loss was a proper off-set against the capital gain resulting from the sale of timber to Dant & Russell (Coos Pacific Timber Co.). \$1,000.00 of the excess is deductible against ordinary income in the year 1948, and the additional excess should be carried over as a loss deduction against capital gains in 1949 and later years (Tr. of Test. 305-307, 312-313) (Exh. 50).

- (e) \$.....: **Cash payments** were made for merchandise in use by the business for which there were receipts in the files of the Nursery which were not taken into account. The amount is unascertainable, but the evidence discloses that the amounts were very substantial (Tr. of Test. 581-582, 590,592, 686).
- (f) \$ **100.99**: Interest paid on 99 W. Motel contract (Tr. of Test. 704).
- (g) \$ **9.10**: Collection charges paid to Bank on 99 W Motel contract (Tr. of Test. 704).
- (h) \$ **1,000.00**: In the year 1947, taxpayer had a short-term capital loss of \$3,000.00 arising out of non-business bad debt, worthlessness of Lester McConkey note. Since no capital gains were realized in 1947, \$1,000.00 of this capital loss was deductible on Leo Elwert's return; \$1,000.00 was deductible on Mary Elwert's return, and \$1,000.00 should have been carried over as a capital loss carry-over to 1948 under **Section 117 of the 1939 Internal Revenue Code**. (Tr. of Test. 3, 722) (Exh. 2).

The only deduction allowed by Government expert Mytinger, was item f (\$100.99) (Tr. of Test. 704), and item c, part of which was offset by the capital gain in 1948 on Dant & Russell timber sale (Tr. of Test. 707).

Neither did they give effect to deductions for the expenditures made in cash for which there were

written receipts in the records (Tr. of Test. 581, 589, 752, 780 to 782).

If effect is given to these deductions, the additional tax liability of \$623.87 computed by the Government's expert, is entirely dissipated and shows that the taxpayer has paid a great deal more than his just tax liability for that year.

F

Re 1949

Count III of the indictment charges that in 1949 defendant had a net income of \$9,007.81 on which there was a tax liability of \$1,669.00; that he failed to make and file a return or to pay the said tax.

The Bill of Particulars as to Count III discloses and the testimony is to the same effect, that the items making up the alleged concealed income were not defendant's **individual** income, but were **partnership** "receipts".

The tax liability for the year 1949, as computed by the Government's expert Mytinger for 1949, was **\$657.08** (Tr. of Test. 716). This computation was made on the basis that the partnership had ordinary net income of \$9,176.04 and long term capital gain of \$1,666.44 (Tr. of Test 715), one-half of which only would be taxable to defendant individually.

These computations were made by taking, as a starting point, the **unsigned** and **unfiled** partner-

ship return for the year 1949 prepared by the accountant Hammond. That return starts with a gross income of \$175,849.60 (Exh. 45).

The record establishes conclusively by the Government's witnesses, Menlow, and Hammond, that this figure of gross income was an **overstatement of between \$19,000.00 and \$20,000.00**. The witness Hammond testified that he re-examined the same records from which he made up that income tax return and was unable to reconcile the figures appearing in the return with those receipts and that the difference was between nineteen and twenty thousand dollars. He could give no explanation for his inability to reconcile the return with the books and records from which he made the return. He was unaware of this discrepancy. It was called to his attention by Revenue Agent Menlow who re-examined the same records and made the computations and he discovered the discrepancy and called it to the attention of the accountant (Tr. of Test. 302, 326, 327, 577, 578).

Since the prepared return was inaccurate to the extent at least that it overstated the gross income, it was, of course, improper to make computations by taking that return as a starting point.

The elimination of this difference of \$19,000.00 to \$20,000.00 in gross income wipes out all of the net income upon which the Government's expert computed the tax liability of **\$657.08** because the entire net income of the partnership was only \$9,-

176.04 ordinary income and \$1,666.44 long term capital gain.

The experts did not give effect to this reduction in gross income in making the computation resulting in the determination of tax liability.

The Government's expert did not give effect to the additional deductions shown in the following summary:

**Summary of Deductions for 1949
Not Taken Into Account in
Computation**

- (a) **\$19,000.00 to \$20,000.00:** The gross income shown on the unfiled partnership return for 1949 was **overstated** by the accountant to the extent of **\$19,000.00 to \$20,000.00** (Tr. of Test. 302, 326-327, 577-578).
- (b) **\$20,000.00:** Payments in excess of that amount made to itinerant laborers in cash for which no record was maintained as heretofore demonstrated.
- (c) **\$ _____ :** Cash paid for business expenditures for which there were receipts in the files of the Nursery, but not taken into account. The evidence does not establish the amount, but it does establish that the amounts were very substantial (Tr. of Test. 581-582, 590-592, 686).
- (d) **\$ 13.00:** Collection charge on Motel 99 W contract (Tr. of Test. 710).

- (e) **\$ 7,520.00:** Capital loss carry-over from 1948 resulting from worthlessness of the Denton Construction Co. bad debt loss (Tr. of Test. 495, 498, 707) and from the worthlessness of Producers Gas & Oil Co. stock (Tr. of Test. 305-308, 311-313).
- (f) **\$15,494.65:** Being one-half of the partnership operating loss for the year 1949 of \$30,989.31, is available as a net operating loss deduction for the year 1947 already noted above (see computation Appendix pp. 5 and 6).

The only deduction taken into account by the Government's expert, was item d (\$13.00) (Tr. of Test. 710).

The Government's case established that there was no tax liability for the tax year 1949.

G

Re Intent and Wilfulness

We submit that the record fails to establish the "specific intent" to defraud the Government, which is the very crux of a prosecution for attempt to evade the tax, by the degree of proof sufficient to establish such intent beyond a reasonable doubt.

We respectfully invite attention of the Court to the rules which have been laid down governing the sufficiency of evidence to establish the requisite intent to defraud.

In **Holland v. United States**, 348 U.S. 121, 75 S. Ct. 127-137, the Supreme Court held:

“A final element necessary for conviction is willfulness. The petitioners contend that willfulness ‘involves a specific intent which **must be proven by independent evidence** and which **cannot be inferred from the mere understatement of income.**’ This is a fair statement of the rule.” (Emphasis supplied).

In **Bloch v. United States**, 221 F. 2d 786-789 (9th Cir.), this Court held:

“Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section.”

In **Wardlow v. United States**, 203 F. 2d 884 (5th Cir), a case of prosecution for intent to evade tax under 145 (b), the Court held:

“The **intent** involved in this offense is **not inherent in the act itself**, but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence.”

In **National City Bank of New York v. Helvering**, 98 F. 2d 93 (2nd Cir.), the Court had under consideration an appeal from the Board of Tax Appeals which upheld a fraud penalty determined by the Commissioner. Judge Learned Hand, speaking for the Court said:

“It is **not enough** that he was defrauding his principal, or knew that he was; he **must have**

meant also to defraud the Treasury. True, he knew that in one way or another he was doing just that, because the bonds were somebody's income, and nobody was paying a tax upon them; but it does not follow, because he was suppressing them so that the Prairie Company could not declare them,—though that may be an actionable wrong—that his return was fraudulent and made with an intent to evade his own tax." (Emphasis supplied).

In **Iley v. Commissioner of Internal Revenue, 19 Tax Court of the United States, 631**, the facts were strikingly similar to those in the case at bar so far as it involved the issue of fraud. There, too, the taxpayer was a farmer, member of a partnership, engaged in farming operations who conducted business in a manner and whose bookkeeping knowledge and experience was similar to that in the case at bar. The Court held:

"Van Fossan, Judge: The first issue involves the question of fraud. Fraud is never to be presumed. It must be proved by clear and convincing evidence. Moreover, the burden of proving fraud rests on the Government. Addressing ourselves to the facts established, we find abysmal ignorance on the part of the party charged with keeping petitioners' accounts; the business had grown from small beginnings to large proportions, but the capacity of the member of the firm keeping the books did not grow in proportion. He was a farm boy, with a high school education, who had neither training nor experience in keeping proper books. There is ample proof of inaccuracies in the books, most of them to the benefit of petitioners, some, however, of benefit to the Government. **Although the bookkeeping was inadequate by any**

standard, there is no evidence of intentional concealment or deliberate misrepresentation. The errors were patent to any one versed in accountancy. The petitioners were guilty of poor judgment in not having the books audited but poor judgment and ignorance are not tantamount to fraud. **There is lacking one essential element, the very heart of the fraud issue, namely, the intent to defraud the Government by calculated tax evasion.**

Although intent is a state of mind, it is nonetheless a fact to be proven by the evidence. **It must appear as a positive factor.** In determining the presence or absence of fraud the trier of the facts must consider the native equipment and the training and experience of the party charged. **The whole record is to be searched for evidence of the intent to defraud.**" (Emphasis supplied).

In *Ferguson v. Commissioner of Internal Revenue*, 14 Tax Court of the United States, 846, on the issue of fraud, the Court held:

"Their sudden prosperity, alleged ignorance, and reliance upon others not fully informed, are inadequate excuses for their incorrect returns. They should have kept better records and they should have known that the net income reported was substantially less than their actual income from the restaurant. An investigation on their part could easily have disclosed the errors. A strong suspicion that Walter knew his income was more than he was reporting might arise from the record. **But suspicion of incredible ignorance or of actual knowledge on his part is not enough. Negligence, careless indifference, or disregard of rules and regulations would not suffice.** The petitioners dismissed their responsibility to file proper re-

turns much too lightly. But the Commissioner, to support the fraud penalties, must prove by clear and convincing evidence that the taxpayers, or one of them, intended to defraud him. The evidence is not quite adequate to support that burden. **It shows no act intended to defraud** and, under all of the evidence, the **negligent omissions** to eliminate the duplications of deductions are **not the equivalent of an intent to defraud.**" (Emphasis supplied).

The rule followed by the Tax Court on the issue of fraud should be applied with greater force in criminal cases.

In **United States v. Lindstrom**, 222 F. 2d 761 (3rd Cir.), the Court held:

"Admittedly mere proof of understatement of taxable income without other evidence of willfulness is insufficient to support a conviction under section 145 (b) . . .

.

There is, therefore, in his case nothing more shown than that his returns understated his taxable income; not enough, as we have said, to support a finding of a wilful attempt to evade tax. His motion for a judgment of acquittal should therefore have been granted."

In **Morissette v. United States**, 342 U.S. 246, 72 S. Ct. 240, the Supreme Court held that

"Knowledge, of course, is not identical with intent."

and that "**presumptive intent**" has no place in a criminal case.

In **United States v. Clark**, 123 F. Supp. 608, the Court held:

“Assuming that there may have been actual underpayment of tax in the two tax years, which more careful auditing might have avoided, the offence charged in the indictment cannot be made out without proof of willful fraud or deceit.”

In **United States v. Murdock**, 290 U.S. 389, 54 S. Ct. 223-226, the Supreme Court said:

“Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.”

In the case at bar, “knowledge” of alleged falsity itself **would have to be inferred from circumstances** for there is no direct evidence in the record that defendant had such knowledge. Consequently, “intent” to defraud cannot be **inferred from inferred knowledge**. It is settled beyond question that **a fact essential to conviction cannot be established by piling inference upon inference.**

See **United States v. Litberg**, 175 F. 2d 20 (7th Cir.), page 28 this brief.

It was incumbent on the Government to establish in this case the deliberate purpose to defraud the Government. That is to say, in filing or causing the returns to be filed and the failure to file the return for 1949, that defendant was aware of and was conscious of the fact that he actually owed more tax than disclosed by the returns filed, that

he filed them deliberately to deprive the Government of a part of the revenue to which it was lawfully entitled, and that the failure to file the 1949 return was, likewise, deliberate and intended to accomplish the same evil purpose.

The Government introduced evidence of certain facts which, standing alone and unexplained, might tend to create suspicion of intent to defraud **some-one**, but not necessarily to defraud the Government. This evidence, generally speaking, falls into two classes:

- (a) The cashing of checks received in payment of merchandise or in connection with sale of capital assets, which were not deposited in the regular bank accounts of the Nursery and, therefore, not reflected in the returns prepared by the accountants;
- (b) The carrying of two bank accounts by defendant under assumed names in 1949 only.

The question is, was this done for the purpose of defrauding the Government out of tax revenue, or for other purposes, lawful or unlawful?

Whatever suspicion these acts generated, was entirely **dissipated by the Government's own testimony** which is part and parcel of the Government's case.

For the purpose of determining whether the case should have been submitted to the Jury, we cannot reject the Government's evidence of an exculpatory character which dissipates the suspicion that would attach to these acts. It establishes as a

part of the Government's case, the reasons and motives for the commission of the acts. (*United States v. O'Malley*, 131 F. Supp., 409).

The exculpatory evidence, which is part of the Government's case, established that the cashing of the checks and the carrying of the bank accounts were wholly unrelated to any intent to defraud the Government of tax revenue.

The practices referred to were caused and induced by the difficulties that stemmed from defendant's unfortunate love affair with another man's wife, the threatened litigation, the actual litigation resulting therefrom, the dissention and estrangement that it created between defendant and his wife, his exclusion by his wife from the business and active participation and control of the finances of the business, and the appropriation of the bank accounts by his wife. The Government's evidence established that these conditions prompted the defendant to resort to the practices referred to above. The practices had no relation to any tax problems.

In addition to this exculpatory evidence, the record establishes beyond any shadow of a doubt that the defendant, as a part of the business, was compelled to have in his possession large sums of money in cash with which to pay itinerant farm labor amounting to more than \$20,000.00 a year and that he cashed checks and used the currency which was expended for that purpose. This practice was

a lawful and legitimate and normal business practice as carried on by those engaged in farming operations in the vicinity in which the defendant's business was conducted and utterly destroys any suspicion or inference that might arise from the bare unexplained fact of the cashing of the checks and conclusively negated the existence of any intent to defraud the Government out of revenue in pursuing the practice of cashing checks. This, too, was established by the Government's testimony as will be presently demonstrated and was corroborated by evidence introduced on behalf of the defendant.

The lack of the requisite intent to defraud the Government is also manifest from the Government's evidence which establishes that the defendant failed to take advantage of many thousand of dollars of the allowable deductions which has heretofore been demonstrated. If the deductions had been taken in these years in question, they would have wiped out all tax liability, to say nothing of the alleged unreported tax liability.

Consideration of the evidence of these allowable deductions which were not taken, demonstrates that the defendant was not tax conscious and not predisposed to engage in tax evasion or even tax avoidance.

The evidence demonstrates that he was a victim of his own ignorance, carelessness, and indifference to his own welfare and was a victim of grossly in-

competent, careless and indifferent accountants which resulted in loss to him.

It goes, without saying that a taxpayer who is predisposed to or bent on cheating the Government out of tax revenue, would not only avail himself of every lawful allowable deduction in reducing his tax liability, but would be disposed to make fraudulent claims to deductions. We find no such disposition on the part of the defendant in the case at bar. The failure to avail himself of the lawful deductions, destroys any implication of an intent to evade taxes.

His accountants were aware of the fact that monies were being expended for itinerant labor in cash for which there was no record. They tried to persuade defendant to maintain some records and called to his attention the fact that his failure to maintain such records was costing him money. His answer was that he was too busy. A taxpayer bent on cheating the Government or who is tax conscious, would have been quick to avail himself of his accountants' instructions and admonitions. This is not the conduct of a person who harbors the intent to cheat the Government.

In addition to the evidence of the allowable deductions which were not taken as heretofore demonstrated, we now call attention to some of the evidence which is part of the Government's case that explains defendant's conduct in the cashing of checks and the maintenance of bank accounts.

It is highly significant on the question of intent that the Government's witnesses Cook and Hammond, both testified that defendant did not at any time request them to understate his income or to overstate his deductible expense.

There is no evidence that he ever suggested that any fictitious entries be made in the books of account with respect to income or expense.

H

Synopsis of Testimony Bearing on Defendant's Intent

Government's witness Cook, accountant who prepared the 1947 return, testified that it was impossible to get Mary Elwert and defendant to keep a check register (Tr. of Test. 34). When the law suit for alienation of affections was threatened in the fall of 1946, the banking arrangements were changed (Tr. of Test. 35). The practice of the partners in keeping records created a "very unsatisfactory situation" from the accountant's standpoint (Tr. of Test. 36). Until the difficulty arose, (threatened law suit) the bank accounts were in their joint names (Tr. of Test. 37). He was never given any records or information with respect to the cash business expenses (Tr. of Test. 38). He complained to defendant that he should keep a record of his cash expenditures for deduction purposes, but he failed to do so and he could not get him to do it (Tr. of Test. 39); that defendant was

annoyed with the details of keeping a register of business expenses paid out in cash (Tr. of Test. 40). He regarded the accountant as a necessary evil (Tr. of Test. 41). Defendant was careless and loose in his accounting methods (Tr. of Test. 41). In 1947, the partnership paid State income tax for the year 1946. Defendant's one-half of the payment was \$3,093.75. (This was an allowable deduction in 1947). He did not take the deduction in that year (Tr. of Test. 46). He did not take any depreciation on the motel owned by defendant for 1947 (Tr. of Test. 49); that defendant was in the habit of paying bills by endorsing and turning over a check received from a customer (Tr. of Test. 54); that he complained to defendant about the inability to take proper deductions by reason of the lack of information (Tr. of Test. 54). He knew of the practice of using itinerant labor (Tr. of Test. 62); that payments in cash were made by defendant to "Mexican labor, and people of that nature, directly." He asked defendant several times to have slips signed. Defendant told him, "they can't even sign their name." He told defendant that he needed such slips, "which will give me a basis on which to put that down as expense. But that was another thing I couldn't get him to do. He was too busy." (Tr. of Test. 63). He explained to defendant the importance of having a record of the cash disbursements; that it would affect his deductions which would be lost. The answer to that was that the men to whom the payments were made could not read or write

and it was difficult to get them (Tr. of Test. 64). The itinerant labor was not included in the State Industrial Accident Commission register (Tr. of Test. 68).

Government's witness Leo J. Hanley, an attorney, testified that in October, 1946, defendant was faced with litigation, a damage action. He succeeded another attorney named Asbahr who handled the matter prior thereto (Tr. of Test. 155-156).

Government's witness Schmidt, a friend of defendant, testified he cashed a number of checks for defendant, which are referred to in the Bill of Particulars, as an accommodation. The reason was, "He wanted the check divided into smaller amounts so he could take care of some Winos and help he had." (Tr. of Test. 164). He testified: "Well, it seemed like at that time he was having some difficulties with his wife, and that his bank account had been attached, or she had taken it out, or something. I don't recall just what the circumstances were . . . He was putting money in that name so he would—his own money. In other words, that money he put in that name he could get in touch with (Tr. of Test. 182). . . . I don't know just how it happened there, but apparently he didn't have any more access to any bank account that he had before (Tr. of Test. 183. He testified: "Q. And I think you further made the statement that you cashed the checks because he was in need of getting funds to take care of Winos and labor. Will you explain what you mean by

Winos, Mr. Schmidt. A. Well, I suppose it was a bunch he picked up down in skid row. He sent in a truck or two trucks a day for help, and the way I understand he had to pay them in cash, so he required money every day to take care of that intinerant help. Q. Was this particularly during the harvest season and the planting season of the year? A. Yes (Tr. of Test. 189), it was Leo Elwert's practice to do that." It was his understanding that Leo Elwert's account that he had formerly used in Tigard had been closed and was not accessible to him for some reason and that he was having trouble with his wife. That was the reason for handling the checks in the way that he described and the advancing of money to him from time to time (Tr. of Test. 190-191). The cash resulting from the \$12,750.00 check was used for those purposes (Tr. of Test. 193). At a later time, he learned that defendant had troubles at home with regard to law suits and with his wife Mary (Tr. of Test. 194).

Government's witness Bernstein, at attorney who was associated with the witness Leo Hanley in representing defendant in connection with the law suit for alienation of affections, testified that the check he received in part payment of the fees was signed by Mary Elwert (Tr. of Test. 208). The reason was that defendant could not sign checks (Tr. of Test. 210). The difficulty started with a demand for \$30,000.00 damages, which resulted in the law suit and was settled in May 1947 (Tr. of Test. 211).

Government's witness Hammond, the accountant who prepared the 1948 and 1949 returns, testified that the records of the nursery were "very crude", but they were not any more so than the average farmer (Tr. of Test 237). What he found in the way of records, was what would be found in connection with the average farmer's operation (Tr. of Test. 238). Defendant was around the place of business very infrequently. He always had difficulty in contacting him (Tr. of Test 255). He learned from the Internal Revenue Agent that there had been cash disbursements for expenses of the Nursery that no record was kept of (Tr. of Test. 256). In reporting the sale of the 99W Motel, defendant took a less favorable income tax position than he was entitled to. He reported the sale on a cash instead of installment basis (Tr. of Test. 260). He criticized Cook, the former accountant, for not having done so (Tr. of Test. 260-261). The whole book-keeping system there was a pretty loose proposition (Tr. of Test. 277). He recognized that there were in the records submitted to him many receipts for cash payment made by the Nursery, but he did not take them into account as deductions. He only took as deductions payments that were made by check (Tr. of Test. 281). He testified that there was an overstatement of gross income in the partnership return which he prepared for 1949. The return showed gross receipts of \$173,319.76 and the records from which he made the return, showed \$158,316.75 (Tr. of Test. 292). He re-examined the

books of account from which he made the returns nad was unable to reconcile the return with the records and could give no explanation for the discrepancy. **The overstatement of income was between nineteen and twenty thousand dollars** (Tr. of Test. 298, 301, 302, 325, 326, 327). He failed to give effect to loss carry-overs resulting from the loss of the capital asset in the amount of \$8,500.00 (Tr. of Test. 305-306).

Defendant did not request or encourage the taking of deductions. The matter of deductions was never discussed (Tr. of Test. 310). He had full charge of the situation and the defendant left the matter entirely up to the accountant (Tr. of Test. 311). He was unable to explain why the carry-overs resulting from the \$8,500.00 loss were not made (Tr. of Test. 313). He gave no effect to the bank account in the Tigard Branch of The United States National Bank in making the tax computation (Tr. of Test. 318). He admitted that he did not examine the additional records that were available at the offices of the Nursery in making up the returns and that he made the returns only from the bank statement and bank checks that were delivered to him (Tr. of Test. 329).

Government's witness Schmitz, Assistant Manager, Citizens Branch, The United States National Bank, testified that interest was paid out by the Bank for the defendant's account in connection with the purchase of the motel (Tr. of Test. 350), but

the interest was never taken as a deduction in the income tax return.

Government's witness Palmer, Assistant Manager of the Tigard Branch of The United States National Bank, testified that the nursery account at that Bank was closed on November 9, 1946, and immediately re-opened in the name of Mary Elwert alone (Tr. of Test 359). The amount that was transferred was \$26,099. 59 (Tr. of Test. 410). Thereafter, the business of the Nursery was carried on through Mary Elwert's account (Tr. of Test. 420). For a time the Bank was authorized by Mary Elwert to permit Leo Elwert to draw small sums to be deposited in the labor account to pay laborers who were normally paid by check, but Mary Elwert cancelled out this authority (Tr. of Test. 455-456).

Government's witness Maynard, Assistant Manager of Pacific First Federal Savings & Loan Association (the Bank in which defendant carried two accounts under an assumed name) testified that defendant had maintained a personal account at that Bank in his own name for some time. There was \$16,665.00 in that account (Tr. of Test. 478). In January 1949, defendant told Mr. Maynard he wanted to withdraw this account. He was concerned about the possibility of someone identifying his account,

"And I made the suggestion that if he wanted to have an account in an assumed name, that was possible." (Tr. of Test. 479-480).

He told defendant it was possible to have an account in an assumed name; that they had other accounts carried that way, and a few days later defendant came back and changed the account to the name of "Schamburg" (Tr. of Test. 480-481).

This is where the idea of carrying a bank account in an assumed name originated. The reason therefore appears in the testimony of the Government's witness Asbahr which follows. Mr. Asbahr, an attorney, testified with respect to that matter:

"Q. What was Mr. Elwert's position about this time in the fall of 1948 with reference to his marital situation with Mary Elwert, if you know?

A. Well, of course, he had a good deal of domestic trouble and had left his home, I think, before this time." (Tr. of Test. 490).

The trouble involved itself into a divorce action which was brought in the State of Idaho. Someone in his office served the papers on Mary Elwert (Tr. of Test. 491).

Defendant consulted with Mr. Asbahr, Government's witness about changing the bank account with the Pacific First Federal Savings & Loan Association in which he had the \$16,000.00. Mr. Asbahr testified:

"A. Well, he was complaining at that time that, due to domestic trouble, his wife Mary had control of most of the funds, and he had great difficulty doing business, and he was attempting to hold some money of his own, but he was afraid he might have it attached,

or something of that type. He told me that he had been up to the Savings & Loan Association and they had told him that he could use an assumed name, and he asked me whether that was legal or not, and I told him Yes, if it was agreeable to the Savings & Loan people it was legal, providing, of course, he was not deceiving anybody.

Q. Did he then act upon your advise and the advise that had been given him by Mr. Maynard and make that transfer?

A. I presume he did. I didn't follow it up.

Q. You don't know what he did?

A. I don't know. I didn't follow it up.

Q. But you recall definitely that he discussed it, do you?

A. Yes, he counseled with me about it." (Tr. of Test. 492-493).

Mr. Asbahr also testified that defendant turned over some checks to him which he received from the sale of some timber land and some other funds and **he explained the reason** therefor as follows:

"A. At the time I believe the purpose was for me to hold this money temporarily, and later he was going to have it applied on account of some other transactions that he was interested in. Incidentally, he had domestic troubles at that time, and he was complaining that his wife had most of the funds and he was unable to do business the way he wanted to on account of not having access to the former funds." (Tr. of Test. 485).

Defendant's troubles started between the 15th and 25th of September 1946 when he received a threatening letter from an attorney representing Bloomquist who was demanding damages for the

alienation of his wife's affections (Tr. of Test. 494-495).

Government's witness Asbahr testified that during the year 1948, defendant sustained a loss of \$22,000.00 which represented part of the funds alleged to be unreported partnership income. Defendant, through Mr. Asbahr, loaned to Denton Construction Company \$22,000.00 in 1948 for which he received promissory notes (Tr. of Test. 495-496). The Construction Company became insolvent in September 1948, it defaulted on its contract with the Bonneville Power Company. It "blew up" in September 1948, and the bonding company took over the job. Asbahr informed the defendant in October 1948 that the loan was a total loss (Tr. of Test. 496, 497, 498, 499).

This loss was not taken as a deduction in 1948. The Government's expert, in making his computation, recognized that it was an allowable deduction.

Government's witness Menlow, Internal Revenue Agent, testified that he had made the investigation of the defendant's returns; that he was unable to reconcile the gross receipts shown on the 1949 partnership return prepared by Hammond with the books of account (Tr. of Test. 578). He found various records showing monies paid out in cash for merchandise (Tr. of Test. 581), but he made no tabulation of these expenses, nor did he take them into account. **He only took into account expenses**

“verified by check” and that was the method used by Hammond (Tr. of Test. 582). He saw in the records the invoices of the Progressive Printing Co. which showed that payment was made in 1948 in cash for printing (Tr. of Test. 583-584). But these expenditures were not taken as deductions by Hammond and were not given effect by the Government’s expert in computing taxable income. He testified: “we had evidence showing that cash expenses were incurred” (Tr. of Test. 590), but they were not taken into account as deductions in making their calculations (Tr. of Test. 590-591). The system of keeping records and doing business at the Nursery was so careless and loose, that when the Revenue Agent Menlow took possession of the records from Hammond, they found United States money orders in the record which had not been cashed (Tr. of Test. 599). In making his examination, he found evidence of the payment of income taxes to the State of Oregon for the tax year 1946 paid in 1947, which were allowable deductions, but he did not give effect to this deduction. He testified: “Q. Weren’t you interested in any other deductions that they might have? A. No, sir. Q. You were not interested? A. Not at all, sir.” (Tr. of Test. 603).

Menlow knew that the gross income for 1949 was overstated and called the matter to the attention of the accountant Hammond and questioned him about it (Tr. of Test. 325-326). Hammond became aware of the over-statement for the first time

when Menlow called it to his attention (Tr. of Test. 327).

Government's witness Kuhn, Revenue Agent, testified that in 1947, 1948 and 1949, all checks on the business account were drawn by Mary Elwert (Tr. of Test. 689).

Government's witness Mytinger, Revenue Agent, who gave expert testimony as to the computations, testified that in making the computations, he assumed that the gross income for the year 1949 was not less than the amount reported in the return prepared by Hammond (Tr. of Test. 710, 711, 712, 713, 714). **He did not deduct from the gross income, the over-statement of nineteen to twenty thousand dollars in the gross income.** The testimony which he gave as to that computation, was admitted over defendant's objection that it was based upon an erroneous assumption or a hypothesis for which there was no foundation in fact. The admission of this evidence was clearly erroneous.

The evidence digested above, all of which is part and parcel of the Government's case, demonstrates that the defendant did not, and could not, have had the evil intent and wilfull purpose to avoid or evade any part of his income tax. That whatever discrepancies there are, were due to carelessness, negligence, incompetence of himself and his accountants, which resulted to his great detriment and

that he, in fact, overpaid his tax liability rather than underpaid the same.

I

Re Fatal Variance

There is a fatal variance between the allegations of the indictment and the proof admitted over the defendant's objections in support of the indictment.

Counts I and II of the indictment charge that defendant attempted to evade the tax by filing a return which understated "his" tax liability.

Count III of the indictment charges that defendant attempted to evade the tax by failure to file **his** income tax for 1949 although **he** had taxable net income, and the failure to pay the tax which "he owed" the Government. All of the three counts relate to defendant's **individual tax liability**.

The Bill of Particulars relating to Counts I and II (Tr. of Rec. 10, 11) purports to tabulate the specific items of defendant's individual "unreported gross income." **The Bill of Particulars relating to these two counts, does not recite that the enumerated items were the gross income or receipts or net income of the partnership.**

The Bill of Particulars relating to Count III (Tr. of Rec. 13) purports to tabulate defendant's individual income upon which the existence of a tax liability is to be computed. The Bill of Particu-

lars does not recite that the enumerated items were partnership “receipts”, partnership “gross income”, partnership “net income” or that it represented defendant’s distributive share of the partnership net income.

Neither the indictment, nor the Bill of Particulars, charged that defendant attempted to evade the tax by the filing of a false **partnership information return** which understated the individual partners’ distributive share of the partnership net income.

All of the evidence introduced by the Government with respect to the items enumerated in the Bills of Particulars established beyond a shadow of a doubt that each item constituted **partnership “receipts.”**

The admission of this evidence was objected to from the very beginning and throughout the trial. It was admitted over the objections. At the close of the Government’s case, a written motion was filed to strike this evidence (Tr. of Rec. 27 to 29, and Tr. of Test. 727). The objections were overruled.

The objection made at the inception of the trial is typical of the objections made throughout the trial. When the 1947 partnership return was offered in evidence, objection was made on the ground that it was not executed by the defendant and on the further ground that the indictment does not

charge any falsity or fraud in connection with the filing of the partnership return, and the indictment charges only that defendant's return did not correctly record his income (Tr. of Test. 12, 13).

Similar objections were made when evidence of each of the items of partnership receipts were offered in evidence. Typical of such objections, is the objection made when the first check was offered in evidence (Tr. of Test. 69). Objection was made on the ground that

"it represents income to the partnership rather than to Leo Elwert There is no claim or allegation in any of the counts with respect to error or omission or fraud in connection with the partnership returns, and for the further reason that the testimony of the witness demonstrates that the proceeds of this check represent gross receipts rather than gross income"

When the objection was overruled, after considerable discussion, a stipulation was entered of record that a continuing objection may be deemed made to each check as it will be offered to avoid the necessity of repeating the objection (Tr. of Test. 76). Nevertheless, the objection was frequently repeated throughout the trial. The admission of this evidence of partnership returns and partnership receipts, was reversible error.

So far as the indictment and the Bills of Particulars are concerned, the defendant's **individual returns** were accurate and truthful insofar as they stated his distributive share of the partnership net

income and the only falsity charged was in the failure to add thereto the items of alleged additional income enumerated in the Bills of Particulars which, according to the indictment and Bills of Particulars, constituted defendant's **individual** additional income.

The defendant had the right to assume that he was to be tried for the failure to include items of **individual income** and not upon a charge that there was a falsity in the statement of his distributive share of the partnership net income as set up in the returns. He had the right to assume that that figure would not be challenged and that he would be called upon only to defend himself against the charges that the specific items enumerated in the Bills of Particulars were his individual income which he intentionally and knowingly omitted from his **individual** return.

A charge of falsity in the partnership information return requires entirely different evidence from the charge of falsity in the partners' individual return in the absence of an allegation in the indictment that the falsity in the individual return consists of an understatement of the partnership net income and defendant's distributive share of said partnership net income.

The items enumerated in the Bills of Particulars consisted of "receipts" (not net income) by the partnership from the sale of partnership merchandise and from the sale of partnership capital assets.

Evidence of "receipts" alone does not constitute evidence of "net income". There is no presumption that the amount received from a sale is all profit. Only the profits from the sales are taxable.

Section 22(a) of the Internal Revenue Code defines "gross income" as "gross, profits . . . derived from . . . sales. . . ." The receipts less the cost of sales constitute the "gains" or "gross income."

That profit is not determined from the profit or loss on each individual sale, but is determined from the entire year's operations, by taking the difference between the **sum total of all sales** and the **sum total of cost of the sales** plus the additional deductions for overhead, operating expenses, and other business deductions.

In the case at bar, while all the evidence introduced in connection with the enumerated items showed that they constituted partnership "receipts" only, the Government did not introduce any evidence that any profits resulted therefrom to the partnership. There was no evidence of cost of sales with respect to these items or of any other of the normal deductions which would enable the Court or Jury to determine that profits were, in fact, derived therefrom.

The evidence of **partnership** "receipts" or "gross income" was a fatal variance from the allegations of the indictment and the Bills of Particulars.

As was said in **Hartman v. United States**, 215 F. 2d 386 (8th Cir.):

"The proof ought to have been confined to that charge.

.

His right was to be tried for the specific offense charged against him."

In **Epstein v. United States**, 174 F. 2d 754 (6th Cir.), the Court held:

"A defendant in a criminal case is entitled to know what he is charged with; and he is **entitled to be tried on the charges brought against him.** *Bratton v. United States*, 10 Cir., 73 F. 2d 795; *United States v. Wills*, 3 Cir., 36 F. 2d 855.

.

The charge in the indictment was entirely different from the accusation of breach of trust through receipt of secret profits by a director. There was, therefore, a fatal variance between the allegations in the indictments and the proofs. *Walker, et al. v. United States*, 4 Cir., 104 F. 2d 465; *United States v. Byers, et al.*, 2 Cir., 73 F. 2d 419; *Fox v. United States*, 7 Cir., 45 F. 2d 364; *United States v. Willis*, *supra*. On the motion of appellants, **the trial court should have entered a judgment of acquittal on the ground of fatal variance; and its refusal to do so was error.**" (Emphasis supplied).

The defendant was not tried on the issue tendered by the indictment and his plea of not guilty. **He was tried on the issue of the truth or falsity of the partnership net income without any allegation putting the same in issue.**

We have found no case in the books, after diligent search, in which a conviction of a partner was sustained upon an indictment which charged un-

derstatement of his **individual** net income and tax liability, without allegations in the indictment charging falsity with respect to the partnership return and willfulness, knowledge, and intent of the individual partner with respect to the partnership return.

In **Levin v. United States**, 5 F. 2d 598 (9th Cir.), this Court affirmed a judgment of conviction of a partner, but in that case, the indictment charged falsity in the "partnership income returns."

In the case at bar, the Court below went so far as to permit the defendant to be tried on an alleged false partnership return for the year 1947, **which he did not even sign and without a scintilla of evidence that he was aware of its contents or that he was even aware that it had been filed.**

The allegations of the indictment were limited by the scope of the two Bills of Particulars. The effect of the Bills of Particulars upon the indictment is clearly stated in the following two cases:

In **United States v. Neff**, 212 F. 2d 297 (3rd Cir.), the Court held:

"Bills of particulars in criminal cases in federal courts are governed by Rule 7(f) of the Federal Rules of Criminal Procedure, 18 U.S.C., which is substantially a restatement of well-settled principles. The latter establish that that a bill of particulars 'Once obtained . . . **concludes the rights of all parties** who are to be affected by it, and he who has furnished the bill of particulars under it, **must be confined to the particulars** he has specified, as

closely and effectually as if they constituted essential allegations in a special declaration'. Otherwise stated, a bill of particulars strictly limits the prosecution to proof within the area of the bill." (Citing numerous cases)

In **Bryan v. United States**, 175 F. 2d 223 (5th Cir.), the Court held:

"Two bills of particulars filed by the United States Attorney **limit the alleged evasions** to understatements of the gross receipts derived from the business operated by Appellant in each of the years. No claim is made that the deductions from the income tax returns of the Appellant were unallowable, fictitious, or false. **Measured, as the proof must be, by these bills of particulars**, the conviction must stand or fall upon the proof, or lack of proof, of false statements knowingly made for the purpose of evading income taxes in the returns of gross business receipts for the years in question."

In the case at bar, the Bills of Particulars alleged the specific items enumerated therein to be defendant's income. The proof established that they were **partnership** "receipts".

The Bills of Particulars alleged that the items were "gross income"; "taxable income"; "concealed gross income"; "adjusted gross income", and other terms indicating that they represent "taxable net income", whereas, the evidence established that all of the items were merely "receipts" to the partnership.

We submit that the variance between the indictment and the proof is fatal and that the mo-

tions for judgment of acquittal should have been granted for failure of proof of the allegations under the indictment.

J

It was the Duty of the Court Below to Grant Defendant's Motions for a Judgment of Acquittal as to each of the Counts of Indictment upon the Record in this Case

At the conclusion of the entire case, there was in the record substantial, if not conclusive, evidence which was consistent with the innocence of the defendant. This evidence came from the Government's witnesses for whose credibility the Government vouched when it called them to the witness stand and is an integral part of the Government's case. No question of the credibility of the witnesses is presented by the record. The exculpatory testimony they gave, cannot be rejected. It must be considered in connection with the evidence they gave from which the Government attempts to draw unfavorable inferences.

The presence in the record as a part of the Government's case of this exculpatory evidence, precluded the submission of the case to the Jury under the authorities which will be presently cited.

The exculpatory evidence negated the existence of any criminal intent. It demonstrated that whatever inaccuracies may exist in the defendant's

returns, and the failure to file the 1949 return, were the result of: Carelessness, ignorance and incompetence of his accountants who had the responsibility of preparing the returns, and of the defendant's own ignorance, carelessness and indifference even to his own financial welfare to such an extent that he failed to avail himself of the many allowable deductions which, if taken and given effect, wipes out any tax liability in excess of the amount reported.

There is, in reality, little or no question of fact. The case involves, in the last analysis, a question as to the inferences to be drawn from the facts testified to by the witnesses and shown by the exhibits.

Under these circumstances, the rule is well settled that the presence of the exculpatory evidence, especially when it is an integral part of the Government's case, makes it the duty of the Trial Court to sustain the motions for a judgment of acquittal.

In **Holland v. United States**, 348 U.S. 121, 75 S. Ct. 127 (a tax evasion case), the Supreme Court enunciated the principle that when the Government's Agents investigate the tax liability of a taxpayer, and in the course of investigation come across "leads" to evidence that "would establish the taxpayer's innocence," they cannot ignore them and build up a case against the taxpayer as though the exculpatory evidence was non-existent., They

must "track down the leads" and ascertain the facts and if that is not done and the evidence of such investigation is not given, "the Government's case (is) insufficient to go to the jury." In short, the Supreme Court placed upon the Government the burden of investigating the exculpatory leads and introducing the evidence pertaining thereto to avoid unjust conviction. The Court held:

"When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation or reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done."

In the case at bar, the Government's Agents did not volunteer any exculpatory evidence. On cross-examination, however, they admitted that in mak-

ing the investigation, they came upon evidence which, if given effect, would minimize and reduce the defendant's tax liability. They came across receipts for cash payments, but refused to check them and ascertain the facts so that proper deduction might be made therefor. They became aware that large expenditures were made by payment in cash to itinerant laborers for which no deductions were taken. They did not investigate this matter and give effect thereto. They found in the records, receipted bills from the Progressive Printing Co. showing payments in cash in sums of \$500.00; \$779.00 and \$3,429.00, but they gave no effect thereto. They learned that there was an over-statement of the gross income of the partnership in the 1949 return to the extent of \$19,000.00 to \$20,000.00, but gave no effect thereto. These are mentioned here by way of illustration merely.

Under the principles laid down by the Supreme Court in the **Holland case**, a judgment of conviction should not be allowed to stand upon testimony of Government's Agents who ignored the principles laid down by the Supreme Court. .

In Maryland & Virginia Milk Producers Ass'n v. United States, 193 F. 2d 907 (Ct. App. D. C.), the Court held:

"It is still the law that there can be no conviction of crime on circumstantial evidence unless the only possible inference to be derived from it is that of guilt. There must be evidence which forecloses and makes impossible any other conclusion." (Emphasis supplied).

In **Hammond v. United States**, 127 F. 2d 752 (Ct. of App. D.C.), the Court held:

“ ‘Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the **duty** of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the **duty** of the appellate court to reverse a judgment against him.’ *Isbell v. United States*, 8 Cir., 227 F. 788, 792.” (Emphasis supplied).

In **Wesson v. United States**, 172 F. 2d 931 (8th Cir.), the Court held:

“The evidence is entirely circumstantial.

.

To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is **not sufficient** to establish a conclusion where the circumstances are **merely consistent** with such conclusion or where they **give equal support to inconsistent conclusions**.

.

Defendant's testimony fully explains the only discrepancies that appeared in any of his prescriptions covering the entire time in controversy. The cases cited to support the government's theory here were cases in which the purchase and possession of extraordinary quantities of narcotics were unexplained. Certainly, **the proven circumstances were as consistent with innocence as they were with guilt, and inferences may not be drawn from inferences**.

.

The circumstances as they stand out in the record are consistent with the direct, uncontradicted and unimpeached testimony of the defendant and his witness. **Mere suspicion raised by the circumstances proved would not sustain a conviction, especially when such suspicion is removed by uncontradicted evidence.**" (Emphasis supplied).

In *Curley v. United States*, 160 F. 2d 229 (Ct. App. D.C.), the Court discussed at considerable length the functions of the trial court on motion for judgment of acquittal and after reviewing numerous cases, said:

"Then, still later, the Circuit Court of Appeals for the Eighth Circuit, relying for authority upon *People v. Bennett*, *United States v. Babcock*, *United States v. Hart*, and *United States v. McKenzie*, **reversed** a judgment for **failure** of the trial court to **direct a verdict** and recited the following as **controlling upon the court in acting upon the motion**: 'Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant; or, in other words, the facts proved **must all be consistent with** and point to his **guilt only and inconsistent with his innocence**. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or of guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted.'" (Emphasis supplied).

In *United States v. Outer Harbor Dock & Wharf Company*, 124 F. Supp. 337, Judge Yankwich quoted

from *Hammond v. United States*, 127 F. 2d 752, the following:

“ ‘the judge cannot let a case go to the jury unless there is evidence of some fact which to a reasonable mind fairly **excludes the hypothesis of innocence**. The statement refers to the requisite **presence of evidence**, and **not to the absence or effect of other evidence**. The second part of the quoted statement means that if, upon the whole of the evidence, a **reasonable mind must be in balance as between guilt and innocence**, a **verdict of guilt cannot be sustained**.’

He went on to say:

“These criteria have the approval of our own Court of Appeals. (citing *Stoppelli v. U. S.*, 183 F. 2d 391 (9th Cir.).

In determining whether there exists the balance between guilt or innocence, of course, the Court may draw inferences from admitted facts, **but inferences upon inferences cannot be made**. As said by the Court of Appeals for the 8th Circuit:

‘As said by us in *Nations v. United States*, 8 Cir., 52 F. 2d 97, 105, in an opinion by Judge Stone: ‘Such **double inferences** are too remote to constitute evidence. As said by the Supreme Court in *United States v. Ross*, 92 U.S. 281, 283, 23 L. Ed. 707: ‘They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain.’ ’ ” (Emphasis supplied).

In *Vick v. United States*, 216 F. 2d 228 (5th Cir.), the Court held that in a case based upon cir-

cumstantial evidence, there can be no conviction where

“One motive is about as likely as another.”

In **United States v. Maghinang**, 111 F. Supp. 760, the Court said:

“In this circuit, it is clear that ‘In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt,’ *United States v. Laffman*, 3 Cir., 1945, 152 F. 2d 393, 394; *United States v. Thatcher*, 3 Cir., 1942, 131 F. 2d 1002, 1003; *United States v. Russo*, 3 Cir., 1941, 123 F. 2d 420, 423, or, as it has been otherwise stated by many courts in this circuit, ‘Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the **duty** of the trial court to instruct the jury to return a verdict for the accused.’ ” (Citing cases).

Under these authorities, it was clearly the duty of the Court below to grant defendant’s motions for judgment of acquittal as to each count of the indictment.

SPECIFICATION OF ERROR NO. III

The Court below erred in giving to the jury the instructions hereinafter set forth.

ARGUMENT

A

The Court gave, among others, the following instructions to the jury:

“Every person subject to income tax, except persons whose gross incomes consist solely of salaries or wages for personal services, or arise solely from farming, is required to keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any income tax return.” (Tr. of Test. 858).

Exception was taken to this instruction as follows:

“We except to the portion of the charge in which your Honor instructed the jury that there was a duty to keep records and the consequences of the failure to do so, on the ground that that issue was not in the case. There is no charge in the indictment of a violation of that section of the Internal Revenue Code, and it is not made an offense not to do so.” (Tr. of Test. 874).

The instruction that the defendant was under that duty was bound to carry with it the implication that failure to keep such records was a violation of law and that the Jury could predicate an

intent to evade the tax upon such failure to keep records. The Jury was not told, in this connection, that if the failure to keep such accounts was due to carelessness, ignorance or inadvertence of the defendant or his accountants, no adverse inference could be drawn therefrom.

In **United States v. Murdock**, 290 U.S. 389, 54 S. Ct. 223, the Court held:

“Congress did not intend that a person, by reason of a **bona fide** misunderstanding as to his liability for the tax, as to his **duty to make a return**, or as to the **adequacy of the records** he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.”

The giving of that instruction introduced an issue foreign to the indictment. None of the counts in the indictment charged attempted evasion by wilfully failing to keep books of account. It is well settled that the giving of an instruction that introduces a foreign issue is erroneous even though the instruction itself may state a correct rule of law.

In **Union Pacific R. Co. v. Garner**, 24 F. 2d 53 (8th Cir.), the Court of Appeals reversed a judgment on the ground that an instruction was given that was not based upon the issues in the case. The Court held:

“The rule is too well settled to require the citation of authorities that instructions should

be confined to the issues made by the pleadings."

This rule should be applied with greater strictness in criminal cases.

In the case at bar, there was no failure to keep records. Records were actually kept at the office of the Nursery and by its accountants. The evidence does establish that the records as kept were inaccurate and that the inaccuracies were due to the carelessness and negligence of the defendant and his accountants. The inaccuracies did not consist solely of the omission of items of income. The inaccuracies consisted in the **failure to record a great many deductible expenditures** running into the many thousands of dollars. Defendant gave no attention to the recording of these deductible expenditures and the accountants, although aware that such expenditures were being made, made no effort to reflect these deductible expenditures in the records and in the returns. So that we do not have a case of failure to keep records. We have here a case of the keeping of records which were inaccurate to the great detriment of the defendant. The evidence did not warrant the giving of the instruction referred to above.

There is a very serious question, to say the least, as to whether the charge is a correct statement of the law in any event. Section 54 of the Internal Revenue Code provides that:

"Every person liable to any tax . . . shall keep

such records . . . make such returns, and comply with such rules and regulations as the Commissioner . . . may from time to time prescribe.”

The Regulation promulgated pursuant to this Act, is **Regulation No. 111, Section 29.54-1**. It provides, so far as applicable:

“Every person subject to the tax **except persons whose gross income (2) arises solely from the business of growing and selling produce of the soil** shall . . . keep such permanent books of account . . . as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return under chapter 1.”

Defendant’s income, except for the one or two isolated transactions resulting in capital gain, consisted of **farming** and is exempt from the operation of the Regulation.

There is no statute defining the failure to keep records as a criminal offense.

The only relevant statute would be Section 145(a) of the Internal Revenue Code which provides that:

“Any person required under this chapter to pay any . . . tax or . . . make a return . . . who wilfully fails to . . . make such return or declaration, keep such records, . . . required by law or regulations, shall, . . . be guilty of a misdemeanor.”

It may be conceded for the purpose of argument, that the failure to keep records, may con-

stitute a **misdemeanor**, under Section 145(a) of the Internal Revenue Code. But **the indictment in this case does not charge any offense under Section 145(a)**. If it did, the prosecution would be barred by the statute of limitations.

Under the **Spies Case**, 317 U.S. 492, 63 S. Ct. 364, violation of Sub-division (a) would not constitute a violation of Sub-division (b), whether it be failure to file a return or failure to keep records.

B

The Court instructed:

“Of course, it is not necessary for the prosecution to prove knowledge of the accused that a particular act or failure to act is a violation of law. Everyone is held to know what the law forbids and what the law requires.” (Tr. of Test. 859).

Exception was taken to this instruction as follows:

“We except to the portion of the charge in which the Court instructed the jury that it was not necessary to prove that the defendant had knowledge that he was violating the law.” (Tr. of Test. 874).

In **Direct Sales Co. v. United States**, 319 U.S. 703, 63 S. Ct. 1265, the Court held:

“Without the knowledge, the intent cannot exist.”

And in **Morissette v. United States**, 342 U.S. 246, 72 S. Ct. 240, the Court held that

“Knowledge, of course, is not identical with intent.”

And "intent"

"is a question of fact which must be submitted to the jury."

The effect of this instruction was to render the defendant criminally liable for his negligence, ignorance or recklessness, and that of his accountants. **It makes the failure of the defendant to exercise due diligence and reasonable care the test of criminal liability.** "Knowledge" and "intent" are dispensed with.

In **Hargrove v. United States**, 67 F. 2d 820 (5th Cir.), a tax evasion case, the Court discussed at length the effect of "**ignorance of the law**" on criminal liability. The trial court instructed:

" 'Ignorance of the law, of course, gentlemen, is not excused. . . .

.

A man may have no intention to violate the law and yet if he willfully and knowingly does a thing which constitutes a violation of the law he has violated the law.' "

The Court held:

"The **court here fell into the error** of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing. In the first class of cases, especially in those offenses *mala prohibita*, the law imputes the intent. *Landen v. U. S. (C. C. A.)*, 299 F. 75; *U. S. v. Balint*, 258 U.S. 250, 42 S. Ct. 301, 66 L. Ed. 604. Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. **In the second class of**

cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence.” (Citing many cases (Emphasis supplied).

This case is squarely in point. Under it, the instruction given by the Court in the case at bar was clearly erroneous and highly prejudicial.

In the case at bar, as in the case cited, the prosecution is under a statute in which specific intent is an essential element and **knowledge that defendant's conduct violates the law cannot be imputed.** This is not a prosecution for a statutory offense in which intent and willfulness are not essential elements.

There can be no intent to violate the law without knowledge of what the law is or without knowledge that what one does or fails to do constitute a violation of law.

C

The Court instructed:

“On the other hand, one who signs a tax return or assists in preparing a return or in providing information to be used therein cannot escape the responsibility of good faith as to the correctness of the return which he made, signed, filed or caused to be filed. A man may not close his eyes to obvious facts and say he is not aware of them. He must exercise such intelligence as he has, and if the evidence establishes beyond a reasonable doubt that the defendant intended to conceal tax liability from the Government, then, of course, he was not acting in good faith.” (Tr. of Test. 863).

Exception was taken as follows:

"We except to the portion of the instructions in which your Honor instructed the jury that when the defendant signed the tax return he could not avoid responsibility therefore except by the exercise of good faith, on the ground that it was too limited in its scope and tended to render him criminally responsible for negligence or mistakes or recklessness of his accountants.

We except to the portion of the charge in which your Honor instructed the jury in what we deemed to be an argumentative way that the defendant may not close his eyes to conditions and the inferences to be drawn therefrom.

And in that same connection a portion of the instruction in which your Honor stated that the taxpayer must exercise his intelligence and indicated the consequences of failure to do so." (Tr. of Test. 875).

This portion of the instructions also dispenses with the necessity of "knowledge" of the falsity of the return and the principle that without "knowledge", there can be no "intent". (**Direct Sales Co. case, supra**). It conveys the idea that "intent" can be inferred from the mere fact that defendant signed a return. It translates carelessness into criminal intent. It ignores and, indeed, rejects the principle that carelessness or negligence can not be translated into criminal intent.

The giving of similar instructions under comparable circumstances have been held to be prejudicial error.

In **Bloch v. U. S.**, 221 F. 2d 786 (9th Cir.), a tax evasion case, the trial Court instructed:

“The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.”

This Court held:

“This is not a correct statement of law with regard to a criminal offense wherein specific intent is an essential element. *Morissette v. U. S.*, 342 U.S. 246, 273, 72 S.Ct. 240, 96 L. Ed. 288; *Wardlaw v. U. S.*, supra. As the Supreme Court said in the *Morissette* case, supra, 342 U.S. at page 275, 72 S. Ct. at page 256:

‘We think presumptive intent has no place in this case.’ ”

The trial Court in that case also instructed as follows:

“ ‘Wilfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done **It includes several states of mind, any one of which may be willfulness to make up the crime.**

‘Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with a careless disregard for whether or not one has the right so to act.’ ” (Emphasis by the Court).

This Court held:

“We think that the italicized (boldface) portion of the above **instruction is erroneous** in this case.”

In **Wardlaw v. U. S., 203 Fed. 2d 884** (5th Cir.), **tax evasion case**, the trial Court instructed as follows:

“The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.”

The Court held:

“The appellant duly excepted to this charge. we think the exception was good and the giving of **this charge was prejudicial error. The intent** involved in this offense is **not inherent in the act itself**, but is a specific intent involving bad purpose and evil motive and that specific intent must be proved by or clearly inferred from the evidence. See authorities Footnote 2, supra.⁵ ”

In **Hartman v. United States, 215 F. 2d 386-394** (8th Cir.), the Court below instructed the jury as follows:

“ ‘The duty to file the return is personal and **cannot be delegated**. Bona fide mistakes should not be treated as false and fraudulent, but **no man who is able to read and write and who signs a tax return is able to escape the responsibility** of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or somebody else.’ ”

The Court of Appeals held:

“The instruction was given in a criminal case on the trial of the charge that defendant violated Section 145(b) in that he did wilfully attempt to defeat and evade a tax due and owing by him to the United States by filing a false income tax return which he knew was false.

Therefore the statement that a man could not escape the responsibility of ordinary diligence as to the correctness of the statement which he signs meant in the connection in which it was used that the jury ought to convict defendant if they found he did not use ordinary diligence as to the correctness of his income tax return.

Such declaration of the law is directly contrary to that of the Supreme Court in *Spies v. U. S.*, 317 U.S. 492, 63 S. Ct. 364, 87 L. Ed. 418. In that case the court said, . . . ‘The charge of the indictment here that defendant attempted to defeat and evade his tax by filing a false return could not be made out by merely showing that he failed to use ‘ordinary diligence as to the correctness of his return. The erroneous instruction was prejudicial.’ ” (Emphasis supplied).

In *Berkovitz v. United States*, 213 F. 2d 468, (5th Cir.), the trial Court gave the following instruction:

“You are instructed that you may find from the facts that the defendant signed his individual income tax returns that he had knowledge of the contents of the return.

The owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, but he

must be held to know that which it is his duty to know. It is for you to determine from all of the evidence whether the defendant has knowledge of the falsity of this return, provided you also find that the return was false." (Emphasis by the Court).

The Court of Appeals held it was prejudicial error to give this instruction.

In *Bentall v. United States*, 262 Fed., 744 (8th Cir.), the trial Judge instructed as follows:

" 'A man's intention in doing or saying a thing must be ascertained from what he does or says. A man cannot say he did not intend to do a certain thing, when the natural consequence of his act is bound to be so and so. He cannot then come in and say that he never intended to do that. A man ought to be and must be judged by the natural consequences of his acts. If this use of the words naturally and necessarily produces that effect, then you must judge of the intention of the man by the words themselves.' "

The Court of Appeals holding that giving that instruction was reversible error said:

"It is true that, when one knowingly does an act (including the utterance of words), the presumption arises that he intended the results which would naturally follow. *Reynolds v. United States*, 98 U.S. 145, 167, 25 L. Ed. 244. But where the act must, as here, be 'knowingly and willfully' done to be criminal, not only a knowledge of the act is implied, 'but a determination with a bad intent to do it.' *Felton v. United States*, 96 U.S. 699, 702, 24 L. Ed. 875; *Hicks v. United States*, 150 U.S. 442, 449, 14 Sup. Ct. 144, 37 L. Ed. 1137. And the presump-

tion of wrongful intent, based upon the natural result of the words or acts, while constituting strong evidence of the presence of such intent, is not conclusive, but rebuttable."

In **Lurding v. United States**, 179 F. 2d 419 (6th Cir.), the Court held:

"The court further advised the jury that 'It is immaterial that the return may have been made out by another person or that some other person may have assisted in the making of the return. When a return is signed and filed by a taxpayer it becomes his return and he, in law, is responsible for that return.' The doctrine of **respondeat superior** is not to be drawn from the law of negligence and applied to criminal liability. It is true that the signing of the return by a taxpayer makes it his return, and that if it is false **and the taxpayer knows it to be false**, he violates the law if he files it with the Collector wilfully with an intent to evade the payment of his tax, but where the crux of the offense is the wilfulness of the understatement it is not an immaterial circumstance that the taxpayer did not make out the return, and it becomes immaterial only when the government has established, by direct proof or by circumstances, that the taxpayer knew or perhaps should have known that the return was false.

We think that these errors were prejudicial, that prejudice was not cured by the remainder of the instructions, and that they call for reversal."

The portions of the instructions, referred to above, fall within the criticism and vice pointed out in the foregoing cases.

The giving of these portions of the instructions was particularly damaging to the defendant be-

cause the case made by the Government was particularly weak on the question of **knowledge** and **intent**. There was strong affirmative evidence **in the Government's case** that negatived intent. This evidence demonstrated that during the times in question, the defendant was involved in very serious difficulties. The Government's witnesses testified that all of the acts (which appear to be inconsistent with ordinary business practices, standing alone, create suspicion), **were directly caused by these difficulties.**

In view of the weakness of the Government's case on the question of intent, the giving of these instructions was tantamount to a direction that intent could be inferred from the fact that he signed the returns and in the case of the year 1949, the failure to file a return. It was an invitation to reject the exculpatory testimony which was **part and parcel of the Government's case**. It, in effect, said that neglect or the failure to "exercise such intelligence as he had", was sufficient evidence to warrant a finding of the requisite intent to evade tax.

SPECIFICATION OF ERROR NO. IV

The Court below erred in the refusal to give instruction number 1, 7, 10, 15, 18, 19, 20, 22, 23, 24, and 26, requested by defendant.

ARGUMENT

During the trial defendant submitted to the Court written requests for instructions to be given to the Jury (Tr. of Rec. 18).

A

In defendant's requested Instruction No. 1, the Court was asked to instruct as to the **elements of the offenses** charged in Counts I and II of the indictment. Among the elements was the following:

"That at the time he filed the said returns and paid the said taxes, the defendant **had the specific intent to evade** the payment of a substantial part of the income taxes which he was legally bound to pay to The United States; that is to say, with the intent to cheat and defraud the Government of taxes legally due and owing to the Government." (Tr. of Rec. 19).

The Court failed to include this element or the substance thereof in stating the elements of the offenses under Counts I and II of the indictment. (Tr. of Test. 854).

The prejudicial effect of the failure to give this instruction, was increased by the fact that the Court, in stating the essential elements **under Count III**, did specifically instruct that specific intent to

evade was an essential element. As to the third Count, the Court instructed:

“Fifth, that the failure to file such income tax return and to pay said tax was with the specific intent to evade the payment of said tax; that is to say, that he intentionally and deliberately refrained from filing the return and paying the tax for the purpose of cheating and defrauding the Government of revenue legally due to the Government.” (Tr. of Test 856).

The inclusion of this element in defining the offense under the third Count, was bound to leave the Jury under the impression that the element of specific intent was not essential to conviction under Counts I and II.

In **Lott v. United States**, 218 F. 2d 675 (5th Cir.), the Court held:

“The court should define the various crimes charged, and the elements of each, to the extent necessary to enable the jury to apply the law to the facts. **Kenton v. Gill**, 81 U.S. App. D.C. 96, 155 F. 2d 176, 179; **Morris v. United States**, 9 Cir., 156 F. 2d 525, 169 A.L.R. 305, and cases therein cited.”

In **Morris v. United States**, 156 F. 2d 525 (9th Cir.), the Court considered the instructions (even though no assignment of error was made) and reversed a conviction because the Court insufficiently defined the offense. The Court held:

“The charge to the jury should not leave the jurors in ignorance of or leave them to their conjecture as to what constitutes the offense charged.

.

In the course of our research we have read decisions upon the point as to whether mere reference by the judge in his instructions to the information or indictment, which is handed the jury to take to the jury room, is sufficient information as to the offense charged. And the great weight of authority is that such practice is not sufficient. **The Court must directly and not by reference to a document in the jury's possession define the offense charged in clear and precise language.**" (citing many cases).

In **23 Corpus Juris Secundum**, page 741, Section 1194, the text says:

"The instructions must contain a definition or explanation of the crime charged, in precise and accurate language, **setting forth the essential elements thereof.** In defining an offense the court may fit the definition to the facts in the case as the evidence tends to show such facts to be. **An instruction is erroneous which assumes to state all the elements of the crime, but omits one or more of them,** or which refers the jury to the indictment or information to ascertain any of the essential elements."

In **Samuel v. United States**, 169 F. 2d 787, (9th Cir.), the Court held:

"In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so." (citing many cases).

B

Requested Instruction No. 7 was as follows:

"The indictment does not charge that there was any falsity or fraud in the filing of the

partnership information returns for the years 1947 and 1948. It only charges that defendant's individual tax returns for those years were filed to evade the payment of a part of his income tax liability." (Tr. of Rec. 7).

The Court did not give this requested instruction or the substance thereof.

The refusal to give this instruction was prejudicial to the defendant. **The indictment did not charge any falsity in the partnership returns for the years 1947 and 1948. It did not charge that defendant's individual tax return for those years was false insofar as it reported his distributive share of the partnership income.** Nevertheless, the Court permitted the introduction of a great deal of evidence designed to show that some **sales made by the partnership were not reflected in the partnership returns.** Under these circumstances, it was essential that the jury should be made aware that the defendant was not on trial for falsity of the partnership returns, but only for falsity of his own individual return.

The error was particularly prejudicial with respect to the tax year **1947** because the **partnership return for that year was not signed by defendant** and there was not a scintilla of evidence that he was aware of its contents.

The refusal was also prejudicial because all of the evidence of alleged additional income (admitted over defendant's objection) consisted of "partner-

ship" "receipts", not partnership "gross income" or "net income" without any evidence to show what part of the "receipts" constituted "taxable net income" (profits). It was important that the Jury should know what part of the partnership "receipts" resulted in "taxable net income" **to defendant individually** to be reflected in his individual return.

C

Requested Instruction No. 10 was as follows:

"You are instructed that if you find from the evidence that there was an under-statement of net income and the tax due thereon in the returns for the years 1947 and 1948, and you further find that the under-statement and under-payment were due to carelessness or negligence, or mistake, or in errors of his accountants, or persons who prepared his returns, and he was unaware of the inaccuracy, you must render a verdict of not guilty as to these counts." (Tr. of Rec. 21).

The Court did not give this instruction or the substance of this instruction. The refusal to give this instruction was highly prejudicial, especially when considered in the light of the instruction given by the Court discussed above under Specification of Error No. III A and B.

There is a great abundance of evidence in the record of carelessness and negligence on the part of the defendant and his accountants in recording both items of income as well as the **failure to record a great many deductible expenses**. The evidence is

part of the Government's case. The record fully warranted the giving of the requested instruction. **It presents the defendant's theory of the based upon substantial, if not, conclusive evidence of the facts included in the hypothesis of the instruction and defendant was clearly entitled to an instruction upon this theory of the case.**

In **Calderon v. United States, 279 Fed. 556 (5th Cir.)**, the Court held:

"Where the evidence presents a theory of defense, and the court's attention is particularly directed to it, it is reversible error for the court to refuse to make any charge on such theory. *Bird v. United States*, 180 U.S. 356, 361, 21 Sup. Ct. 403, 45 L. Ed. 570; *Hendrey v. United States*, 233 Fed. 5, 18, 147 C. C. A. 75; *Liner v. State*, 124 Ala. 1, 7, 27 South. 438; *Banks v. State*, 89 Ga. 75, 14 S.E. 927. We think the court erred in refusing to charge the jury as to the defendant's theory of the case, and that such error requires a reversal of the judgment of conviction of the plaintiff in error."

D

Requested Instruction No. 15 is as follows:

"You are instructed that the burden of proving the defendant guilty of the offenses charged in the indictment **never shifts** from the Government. The burden is not upon the defendant to prove his innocence. That burden rests upon the plaintiff." (Tr. of Rec. 22).

The request clearly embodied a correct and fundamental rule of law and defendant was entitled to the benefit of such an instruction. The failure

to give this instruction was prejudicial to the defendant.

E

Requested Instruction No. 18 is as follows:

"You are instructed that if the defendant had no net income in the tax year of 1949, there would be no tax liability for that year and the failure to file a return for that year would not constitute an offense under Section 145 (b) of the Internal Revenue Code, and your verdict must be for the defendant on Count III of the indictment." (Tr. of Rec. 22).

The Court did not give this instruction or the substance thereof.

There is a great deal of substantial, if not conclusive, evidence **in the Government's case** that defendant had no taxable income in the tax year 1949. Defendant was entitled to an instruction based upon his theory of the case and the hypothesis included in the request.

There can be no attempt to evade the tax without tax liability.

United States v. Schenck, 126 F. 2d 702 (Second Cir.).

Gleckman v. United States, 80 F. 2d 394 (Eighth Cir.).

It is settled beyond question that a defendant is entitled to an instruction submitting the case to the jury on his theory of the case as to which there is evidence in the record.

In **Marson v. United States**, 203 F. 2d 904-912 (6th Cir.), the Court held:

“With respect to a charge on the theory relied upon, it is the law that where a defendant in a criminal case presents a theory supported by the evidence, and the court’s attention is particularly directed to it, it is reversible error to refuse to give a charge on such theory.”

In **Tatum v. United States**, 190 F. 2d 612 (Ct. App. Dist. Col.), the Court held:

“‘in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.’”

F

Requested Instruction No. 19 is as follows:

“You are instructed that even if the defendant had net income subject to income tax in the tax year 1949, but failed to file an income tax return and pay the tax therein through inadvertence, mistake, or oversight, your verdict must be for the defendant on Count III of the indictment.” (Tr. of Rec. 22).

The Court did not give this instruction or the substance thereof.

There is very substantial if not conclusive evidence in the record to the effect that the failure to file a return for the tax year 1949 was due to mistake or inadvertence. The record establishes that the accountant prepared a partnership return and individual returns for that year. He testified that

he brought the returns to the home of Mary Elwert; that Leo and Mary Elwert were both present; that he handed them the returns, told them to sign them and file them (Tr. of Test. 227). The returns showed no tax liability (Exhs. 44 and 45). The returns were not signed. There is no evidence as to why they were not signed and filed. **But there is very strong evidence in the Government's case that the returns were not, in fact, delivered by the Accountant Hammond to the Elwerts. The testimony in the Government's case establishes that the original returns, which Hammond, the accountant, prepared, were found by the Internal Revenue Agents Menlow and Kuhn among the records which they obtained from the Accountant, Hammond (Tr. of Test. 577). They had photostatic copies of those returns made. They later returned the records, including the returns, to Hammond and Hammond delivered them with the returns to defendant's accountant, Eise-man. (Tr. of Test. 569-570).**

This testimony establishes very definitely that the returns were not delivered by Hammond to the Elwerts; that they remained in his possession at all times and that the failure to file the returns were due to some over-sight, negligence or inadvertence of the accountant.

Defendant was entitled to have the case submitted to the Jury on the hypothesis included in the requested instruction because there was substantial, if not conclusive, evidence to establish that

hypothesis. The failure to give the instruction was prejudicial error.

Morris v. United States, *supra*.

Tatum v. United States, *supra*.

G

Requested Instruction No. 20 is as follows:

“Evidence has been introduced tending to show that through mistake, inadvertence, ignorance and other causes the accountants, who prepared the returns for the defendant, failed to take deductions from gross income which would have reduced his tax liability if the deductions had been taken.

If you find from the evidence that there was failure to take deductions to which the defendant would have been entitled, you are instructed that you should take that fact into account in determining whether an under-statement in net income, if any there be, was made with the specific intent to defeat and evade income tax, or was due to negligence, carelessness, or ignorance.” (Tr. of Rec. 22-3).

The Court did not give this instruction or the substance thereof.

There is a great deal of conclusive evidence that the accountants who prepared defendant's returns, those that were filed and the one that was unfiled, failed to take many allowable deductions of very substantial amounts which would reduce or wipe out tax liability in those years. Some of the failures to take deductions were due to the carelessness of the defendant in failing to keep adequate

records of such expenditures and to inform the accountant thereof. But the evidence establishes very definitely that such expenditures were made in very large amounts as already demonstrated.

Defendant was entitled to have the case submitted to the jury upon the hypothesis included in the requested instruction.

Morris v. United States, *supra*.

Tatum v. United States, *supra*.

The failure to take allowable deductions is very strong evidence of lack of intent to evade tax liability. A taxpayer bent on cheating the Government would avail himself of every dollar of allowable expense as a deduction and would be disposed, if anything, to over-state such deductions. **The failure to take the allowable deductions is inconsistent with intent to evade.** The requested instruction was very important on the question of intent and the failure to give the instruction was prejudicial error.

H

Requested Instruction No. 22 is as follows:

“Evidence has been introduced that the defendant cashed remittances representing income to the partnership and expended the cash in payment of labor and materials and other business purposes; that the cash received from said remittances was not reflected in the books of the partnership and that the expenditure of said funds for business purposes was not reflected in the books of the partnership.

You are instructed that if you find that defendant did cash remittances constituting reve-

nue of the partnership and expended the cash in payment of labor, materials and other business expenditures on behalf of the partnership, the cashing of said remittances does not constitute concealment of net income or evasion of tax liability." (Tr. of Rec. 23).

This requested instruction was not given, nor did the Court give the substance thereof. There is an abundance of substantial evidence in the record to sustain, the hypothesis upon which the requested instruction was predicated. Defendant was entitled to have the case submitted to the jury upon that theory of the case.

Morris v. United States, *supra*.

Tatum v. United States, *supra*.

I

Requested Instruction No. 23 is as follows:

"You are instructed that the charges in Counts I and II of the indictment that defendant attempted to evade his tax by filing a false return, cannot be made out by **merely showing that he failed to use diligence** as to the correctness of his return for the years involved in those two counts." (Tr. of Rec. 24).

The Court did not give this instruction, nor the substance thereof. It stated a correct principle of law and was particularly applicable to the evidence as it was developed in the Government's case. The giving of such an instruction was especially necessary because of the instruction which the Court gave relative to the exercise of reasonable diligence by the defendant in the preparation of returns and

the consequences of the lack of reasonable diligence. This instruction, if given, would have made clear to the jury the lack of diligence alone was not sufficient to establish intent.

J

Requested Instruction No. 24 is as follows:

“In determining whether or not the defendant had such specific intent, you may take into consideration the defendant’s business or occupation, the extent of his education, his knowledge, or lack of knowledge, of bookkeeping or accounting; the extent of his familiarity with the keeping of ordinary business records; the employment by the partnership of accountants who were former employees of the Internal Revenue Bureau; that defendant believed them to be fully qualified to supervise and keep the records of the partnership, and to make proper income tax returns. You may also take into account for that purpose, the business and other difficulties in which the defendant was involved in the tax years in question and the extent to which they caused him to engage in practices which may be deemed to be out of the ordinary business practices. You may also take into account the fact, if you find it to be a fact, that in the operation of the business of the partnership, it was necessary for the defendant to have in his possession daily, large sums of cash with which to pay for purchases of supplies and other expenditures on behalf of the partnership. You may also take into consideration the fact, if you find it to be a fact, that the defendant failed to take deductions in the tax years in question which would have resulted in reducing his tax liability.

These are all factors that can be properly considered by you, along with all other evidence in the case, in determining whether or not the defendant filed the said returns with the specific intent to defeat the payment of a part of his income tax for those years." (Tr. of Rec. 24-5).

The Court did not give this instruction or the substance thereof.

Since the crucial element in the case was the specific intent to evade defendant's tax liability, the defendant was entitled to have the Court instruct the jury as to the elements that the jury could properly consider in determining the existence or non-existence of the specific intent to evade.

There was substantial evidence in the record to establish the existence of all of the circumstances or elements involved in the hypothesis incorporated in the instruction.

K

Requested Instruction No. 26 is as follows:

"Evidence has been introduced to the effect that the books and records maintained by the Tualatin Valley Nursery partnership, were incomplete, inadequate, and defective.

You are instructed that the defendant cannot be convicted of the offenses charged in the indictment merely because the books and records were kept in that manner.

If you find that the books and records were incomplete and inaccurate and the records were

so maintained through carelessness, mistake, or ignorance, and that the defendant was unaware of the fact that they were so kept, an under-statement of the net income in the income tax returns, if any there be, would not constitute a wilfull attempt to evade the payment of tax, and your verdict must be for the defendant." (Tr. of Rec. 26).

The Court did not give this requested instruction or the substance thereof.

The failure to give this instruction was especially prejudicial to the defendant because of the instructions that the Court gave with respect to the necessity of keeping books of account and records (Spec. of Error III A).

The instruction as given, imposed the duty of keeping records and it left the implication that the failure to keep the records or keeping the records inaccurately, would make defendant criminally liable. It was, therefore, essential that the jury should be instructed that if the inaccuracy or inadequacy of the records resulted from carelessness of the defendant or his accountant, no criminal responsibility could be predicated thereon. The failure to give that instruction or the substance thereof was prejudicial error. There was an abundance of evidence, if not conclusive evidence, in the record to support the hypothesis included in the requested instruction and defendant was entitled to have the case submitted to the jury on his theory of the case.

We submit that each of these requested instructions embodied correct principles of law; they were predicated upon substantial, if not conclusive, evidence; they were essential for the protection of the defendant's rights and for a proper consideration of the case by the jury. Many of these instructions were especially important in view of the instructions that were given by the Court to overcome erroneous conclusions when left unexplained by the requested instructions.

Whatever may be said as to the error in refusing to give any one or more of the instructions, the cumulative effect of the failure to give all of the said instructions was highly detrimental to a proper consideration of the case upon the hypothesis involved in the instructions.

CONCLUSION

The error of the Court below in failing to grant defendant's motions for judgment of acquittal as to each of the counts of the indictment, stems from the failure to give due consideration and effect to the exculpatory evidence which is an integral part of the Government's case.

In the case at bar, the exculpatory evidence did not come from the defendant or from witnesses produced by the defendant in the defendant's case (except insofar as it confirmed and was consistent with the Government's testimony). It came from the Government's witnesses as part and parcel of its case. The acceptance of and giving effect to that exculpatory evidence did not depend on the credibility of the witnesses. Since the exculpatory evidence was an integral part of the Government's case, the Court below was bound to accept it and give effect thereto on the motions for judgment of acquittal. It was bound to accept the explanations and reasons for the acts that might otherwise give rise to suspicion or even adverse inference. The Court below is also bound to give effect to the evidence of defendant's failure to take the many allowable deductions which not only wipe out any tax liability in excess of the amount reported in the returns, but established losses in the years in question and large overpayment of taxes.

It has been held that even in cases where the exculpatory evidence comes from the defendant and

his witnesses, that judgment of acquittal must be granted if that evidence is credible and explains the discrepancies. (**Wesson v. U. S.**, 172 F. 2d 931).

Upon the record in this case, the judgment of conviction should be reversed with directions to enter a judgment of acquittal as to each of the counts of the indictment.

Respectfully submitted,

S. J. BISCHOFF,
GEORGE W. MEAD,
Attorneys for Appellant.



APPENDIX

The following tabulations and computations are not exhibits. They are computations made by Appellant based on the computations of Government's expert Mytinger and defendant's computations based upon the evidence.

I

Computation of Partnership income for 1947.

	Amount	Per Return	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contentions
Ordinary Income				
Partnership income		\$58,587.88	\$58,587.88	\$58,587.88
Unleged additional partnership receipts per Mytinger's computations			23,196.74	23,196.74
Total		\$58,587.88	\$81,784.62	\$81,784.62
Additional Deductions				
Cash paid to Progressive Printing Co. Test. of Walsleben, Tr. of Test. 761				3,429.25
Cash paid to itinerant workers (mini- mum amounts)				
Cherry harvest, 20 days x 20 men @ \$5.00 (Tr. of Test. 749 and 798)....	\$ 2,000.00			
Nursery work, 65 days x 25 men @ \$5.00 (Tr. of Test. 771, 799, 800)....	8,125.00			
Nut harvest, 30 days x 50 men @ \$5.00 (Tr. of Test. 797, 798).....	7,500.00			
Prune harvest, 30 days x 25 men @ \$5.00 (Tr. of Test. 795, 796)	3,750.00			21,375.00
Losses on sales of depreciable business property (Sec. 117J assets):				
Loss on sale of Motel 99 W.....	\$ 540.00			
Loss on sale of army truck	550.00	see below	1,090.00	1,090.00
Partnership's ordinary net income —½ carried over to defendant's individual computation		\$58,587.88	\$80,694.62	\$55,890.37
Net-Term Capital Loss				
Non-business bad debt — Lester Mc- Conkey note—½ carried over to de- fendant's individual computation		see below	see below	\$ 3,000.00
Net-Term Capital Loss				
Loss on sale of Motel 99 W	\$ 270.00		see above	see above
Loss on sale of army truck	275.00		see above	see above
Bad debt—Lester McConkey note	\$ 1,500.00		\$ 1,500.00	see above
Total capital losses — ½ carried over to defendant's individual computation		\$ 2,045.00	\$ 1,500.00	\$ 3,000.00

II

Computation of Appellant's individual net income and tax liability for 1947.

	Per Return	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contentions	
			Before Net Operating Loss Carry-Back	After Net Operating Loss Carry-Back
½ of partnership income.....	\$29,293.94	\$40,347.31	\$27,945.18	\$27,945.18
Less: ½ of capital loss, but not more than \$1,000.00	1,000.00	750.00	1,000.00	1,000.00
½ of net operating loss carry-back from 1949				15,494.00
Adjusted gross income.....	\$28,293.94	\$39,597.31	\$26,945.18	\$11,450.18
Less: Standard deduction.....	500.00			
Oregon income taxes paid (Tr. of Test. 45, 604, 612 to 614 and 703) ..		3,093.75	3,093.75	3,093.75
Net income	\$27,793.94	\$36,503.56	\$23,851.43	\$ 8,356.43
Less: exemptions	1,000.00	1,000.00	1,000.00	1,000.00
Taxable net income	\$26,793.94	\$35,503.56	\$22,851.43	\$ 7,356.43
Tentative tax	\$11,232.24	\$16,737.31	\$ 8,882.34	\$ 1,767.31
Less: 5% reduction.....	561.61	836.87	444.11	88.87
Total tax liability.....	\$10,670.63	\$15,900.44	\$ 8,438.23	\$ 1,678.18
Capital loss carry-over to 1948.....				\$ 1,000.00
			Before	After
			Net Operating Loss Carry-Back	
Summary				
Federal income taxes paid		\$10,670.63	\$10,670.63	
Total tax liability per defendant's computation		8,438.23	1,678.68	
Overpayment.....		\$ 2,232.40	\$ 8,991.95	

III

Computation of Partnership Income for 1948.

	Per Return	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contentions
Ordinary income			
Partnership income	\$27,015.34	\$27,015.34	\$27,015.34
Alleged additional partnership receipts per My- tinger's computations		3,532.42	3,532.42
Voice copies identified by Mrs. Lillian Helvie			75.40
Total	\$27,015.34	\$30,547.76	\$30,623.16
Additional Deductions			
Cash paid to Progressive Printing Co.—testimony of Walsleben			779.05
Cash paid to itinerant workers, as per 1947 com- putations			21,375.00
Interest paid on 99 W Motel contract (Tr. of Test. 704)		100.99	100.99
Collection charges (Tr. of Test. 704)		9.10	9.10
Partnership ordinary net income—carried over to defendant's individual computation	\$27,015.34	\$30,437.67	\$ 8,359.02
Capital gain and losses			
Sale of timber to Dant & Russel—long-term, only ½ reportable		\$18,930.00	\$18,930.00
Bad debt—Denton note, (Tr. of Test. 707, 495 to 498)		18,930.00	22,200.00
600 shares of Producers Gas and Oil Co. common stock, worthless at 12-31-1948, cost \$8,500.00, only ½ reportable (Tr. of Test. 305 to 308, 311 to 313)			4,250.00
Capital loss carry-over from 1947—Lester McCon- key note		none	1,000.00
Excess of capital losses—carried over to de- fendant's individual computation		none	\$ 8,520.00

IV

Computation of Appellant's individual net income and tax liability for 1948.

	Per Return	Per Plaintiff's Expert (Mytinger)	Per Defendant Content
Ordinary partnership income.....	\$27,015.34	\$30,437.67	\$ 8,359
Less: capital loss of \$8,520.00, but not to exceed \$1,000.00			1,000
Adjusted gross income.....	\$27,015.34	\$30,437.67	\$ 7,359
Less: deductions	1,692.60	1,692.60	1,000
Net income	\$25,322.74	\$28,745.07	\$ 6,359
Less: exemptions	2,400.00	2,400.00	2,400
Taxable income	\$22,922.74	\$26,345.07	\$ 3,959
One-half of taxable income.....	\$11,461.37	\$13,172.53	\$ 1,979
Tax on one-half.....	\$ 3,195.32	\$ 3,904.19	\$ 395
Less: reduction	403.44	488.50	67
Tax liability on one-half.....	\$ 2,791.88	\$ 3,415.69	\$ 328
Tax on total income	\$ 5,583.76	\$ 6,831.38	\$ 657
Capital loss carry-over to 1949 and later years from above			\$ 7,520
Summary			
Federal income tax paid		\$ 5,583.76	
Total tax liability per defendant's computation ..		657.20	
Overpayment		<u>\$ 4,926.45</u>	

V

Computation of Partnership
Income for 1949.

	Per Unfiled Return	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contentions
Ordinary income			
Partnership income	\$ 1,833.32	\$ 1,833.32	\$ 1,833.32
Unleged additional partnership receipts per My- tinger's computations		7,355.72	7,355.72
Additional cash sales claimed, invoice copies iden- tified by Lillian Helvie			209.65
Total	\$ 1,833.32	\$ 9,189.04	\$ 9,398.69
Additional deductions			
Overstatement of receipts (Tr. of Test. 302, 326, 327, 378) at least			19,000.00
Cash paid to itinerant workers per 1947 computa- tions			21,375.00
Collection charge		13.00	13.00
Partnership ordinary net income/loss— $\frac{1}{2}$ car- ried over to defendant's individual computa- tion	\$ 1,833.32	\$ 9,176.04	\$30,989.31
Total gains and loss			
Timber sale to Longview Fibre Co.—long-term— $\frac{1}{2}$ only		\$ 1,666.44	\$ 1,666.44
Gain— $\frac{1}{2}$ carried over to defendant's individ- ual computation	none	\$ 1,666.44	\$ 1,666.44

VI

Computation of Appellant's individual net income and tax liability for 1949.

	$\frac{1}{2}$ of Amount in Unfiled Joint Returns	Per Plaintiff's Expert (Mytinger)	Per Defendant's Contention
$\frac{1}{2}$ of partnership income.....	\$ 916.66	\$ 4,588.02	\$15,494
Capital gain—Longview Fibre Co.—Long-term— $\frac{1}{2}$ only	833.22	833.22	833
Less: Capital loss carry over from 1948—allowable this year \$7,520.00.....			1,833
Oregon income tax—standard deduction	666.44	542.12	
Exemptions	1,200.00	1,200.00	1,200
	none		
Taxable income	\$ 1,083.44	\$ 3,679.12	no
Tax liability	none	\$ 657.08	no

Summary

Federal income tax paid	none
Total tax liability per defendant's computation.....	none
Underpayment.....	none

IN THE
United States Court of Appeals
For the Ninth Circuit

LEO ELWERT, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Judgment of the United States
District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 14846

LEO ELWERT, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the Judgment of the United States
District Court for the District of Oregon

BRIEF FOR THE APPELLEE

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

This is an appeal from a judgment convicting appellant, after a jury trial, on three counts of an indictment filed November 20, 1953, charging willful attempts to evade and defeat income taxes due and owing by him for the calendar years 1947, 1948 and 1949, in violation of Section 145(b) of the Internal

Revenue Code of 1939. (Supp. R. 1-4.)¹ Jurisdiction was conferred on the District Court by 18 U.S.C., Section 3231. On March 31, 1955, a verdict of guilty was entered as to each count. (Supp. R. 36.) On April 14, 1955, a motion for arrest of judgment (Supp. R. 37) and a motion for judgment of acquittal, and in the alternative for a new trial (Supp. R. 38-49, were filed.² These motions were denied. (Supp. R. 50.) Judgment was entered on April 29, 1955. (Supp. R. 51-52). Within ten days and on May 2, 1955, notice of appeal was filed. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the indictment charging willful attempt to evade taxes stated an offense against the United States.

¹ Record references (R.) are to the three volume reporter's transcript of testimony. Supplemental record references (Supp. R.) are to the fifty-three page transcript of written indictment, motions and orders filed at the District Court.

² Rules 29(b), 33 and 34, Federal Rules of Criminal Procedure, specify five days after the verdict of guilty as the time within which to bring these motions. Rule 33 and 34, Federal Rules of Criminal Procedure provide an alternative "within such further time as the court may fix during the 5-day period." It does not appear on the face of the record whether the court, between March 31, 1955, and April 5, 1955, fixed a further time in which to bring the motions for new trial and arrest of judgment. See *Marion v. United States*, 171 F. 2d 185 (C.A. 9th), certiorari denied, 337 U.S. 944; *Pugh v. United States*, 197 F. 2d 509 (C.A. 9th), reversed on other grounds upon rehearing, 212 F. 2d 761. However, the sufficiency of the evidence was raised by timely oral motions for judgments of acquittal. (R. 727-728, 844.)

2. Whether the evidence was sufficient to support the verdict.

3. Whether the trial court's instructions were fair and complete.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* —Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * *

(26 U.S.C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 7. THE INDICTMENT AND THE INFORMATION

* * * *

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclu-

sion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

* * * *

STATEMENT

On November 20, 1953, an indictment was returned against appellant charging him with willful attempt to evade his income taxes for the years 1947, 1948 and 1949, in violation of Section 145(b) of the Internal Revenue Code of 1939. The indictment alleged that the willful attempts to evade taxes for the years 1947 and 1948 were committed by filing false returns. For the year 1949 the willful attempt to evade taxes was alleged to have been committed by failing to make an income tax return, by failing to pay the tax, and by concealing and attempting to conceal his true gross income. The amounts of net income and the taxes thereon, as reported in the returns and as corrected, were alleged to be as follows (Supp. R. 1-4):

Year	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1947)	\$27,793.94	\$10,670.68	\$39,822.86	\$17,981.38
Count II (1948)	27,015.34	5,583.76	48,731.82	15,919.48
Count III (1949)	- 0 -	- 0 -	9,007.81	1,669.00

Appellant moved to dismiss all three counts of the indictment. (Supp. R. 5, 7.) The motions were denied. (R. 7; Supp. R. 8.) In response to appellant's motions, bills of particulars were filed without opposition. (Supp. R. 10-15.) On March 22, 1955, the trial commenced. An objection to the introduction of evidence was overruled. (R. 9.) On March 29, 1955, a motion to strike the Government's evidence was made and denied. (R. 727; Supp. R. 27-29, 34.) At the close of the Government's case, and again at the close of all evidence, motions for judgment of acquittal were made and denied. (R. 727-728, 844; Supp. R. 30-35.) On March 31, 1955, after eight days of trial, the jury returned on each of the three counts a verdict of guilty. (Supp. R. 36.) Motions for arrest of judgment, judgment of acquittal and a new trial were made and denied. (Supp. R. 37-50.) On April 29, 1955, the District Court sentenced appellant to imprisonment for eighteen months on each of the three counts, with sentences to run concurrently, and imposed a fine of \$1,000 each on Counts I and II and \$500 on Count III, for a total of \$2,500. (Supp. R. 51-52.) Notice of appeal was filed on May 2, 1955.

For the years involved Leo Elwert and his wife Mary Elwert were engaged in a business partnership known as the Tualatin Valley Nurseries. The nursery

was located in the vicinity of Sherwood, Oregon (R. 518), approximately twenty miles southwest of Portland (R. 184). Besides growing and selling nursery stock the Tualatin Valley Nurseries engaged in other operations including the production and sale of grapes, nuts and dried prunes. (R. 122, 791-795.) To prove its case the Government established by specific items the amount of unreported income earned by Tualatin Valley Nurseries. Included in Appendix to this brief are some tables showing each step of proof upon which the additional partnership income was calculated for each of the three years involved. One-half of this additional income for 1947 and 1949 was attributed to appellant as reportable on his individual returns for those years. (R. 701-703, 715-716.) All of the additional partnership income was attributed to appellant and his wife as reportable on their joint return for 1948. (R. 705-706.)

The evidence to support the verdict may be summarized as follows:

For some time prior to the period here involved, appellant Leo Elwert and his wife Mary Elwert had maintained two bank accounts, a joint account in the Sherwood bank³ and the Tualatin Valley Nurseries

³ Throughout the trial the Citizens Branch of Sherwood was referred to as the Sherwood Bank. In 1951, the Citizens Bank of Sherwood merged with the Commercial Bank of Oregon. The Sherwood bank became known as the Sherwood Branch of the Commercial Bank of Oregon. On November 29, 1954, the Commercial Bank of Oregon merged with the United States National Bank. The Sherwood bank then became known as the Sherwood Branch of the United States National Bank. (R. 651-652.)

account in the Tigard Branch of the United States National Bank. (R. 359, 653-654.) From the nursery, these two banks were approximately one and one quarter miles and eight miles away, respectively. (R. 815.) Into the two accounts of these banks they deposited the business receipts reported on their income tax returns. (R. 19, 220-221.) During the course of the three years here involved, appellant used accounts in more distant banks to which he made deposits of income not reported on his tax returns. (See Tables I-III, Appendix, *infra*.)

The Tax Evasion Period

On January 14, 1947, appellant went to Portland and there opened a personal checking account at the Southwest Portland Branch of the First National Bank. (R. 104, 108, 111.) Appellant gave 4930 Southeast 72nd as his address and Sunset 0979 as his telephone number. The address and telephone number were not his but those of a friend, A. D. Schmidt. (R. 107, 112, 179-180.) During the early part of 1947, he deposited to this account three checks representing proceeds from sales of nursery stock. These items were not reported on his income tax return for 1947. (Ex. 8, 11, 12, 14, 15; R. 18-19, 66, 85, 94, 96, 97-99, 105, 106, 635, 640, 645; see Table I, Appendix, *infra*.) The bank account was closed on January 23, 1948. (R. 111.)

On March 12, 1947, appellant and A. D. Schmidt went to the Portland Branch of the Bank of California where Schmidt had an account. Appellant gave

Schmidt a check dated February 21, 1947, which had been drawn on a bank in Colorado in the sum of \$2,458.55 by one J. W. Cutter. Schmidt deposited this check to his account. He then drew upon his account a check in the same amount and delivered it to appellant. Then on this same date appellant opened an account in this bank with a deposit of Schmidt's check for \$2,458.55. (Ex. 27, 36, 38-A, 39-A, 40; R. 166-169, 185-186, 201, 204.) On several other occasions during the following three months appellant met Schmidt in Portland and each time gave him a check representing a sale of nursery stock. Each time appellant waited at Merrill-Lynch's brokerage house while Schmidt went a block away to the bank and returned. On some occasions Schmidt deposited the check in his own account and then returned to give appellant a check drawn on the same account. (Ex. 16, 18, 21, 22, 40; R. 113-115, 120-122, 129, 133-134, 136, 137-138, 161, 163, 171-172, 177-179; see Table I, Appendix, *infra*.) On other occasions Schmidt deposited the check to appellant's account at this bank. (Ex. 17, 23, 24; R. 117-119, 129, 138-140, 161-162, 202-203; see Table I, Appendix, *infra*.) Appellant closed this account on August 22, 1947. (R. 199, 204.) Included among the checks deposited by Schmidt was one check for \$12,750.⁴ This particular check dated April 4, 1947, represented a sale of Concord grapes to Church Grapejuice Company. (R. 120-122, 163.) All of these checks were

⁴ In recalling the circumstances under which he had handled this check for \$12,750, Schmidt testified that (R. 163) "He [Elwert] asked me to deposit it to my account and issue checks for smaller amounts at different dates."

issued or deposited not long before or after the ides of March. (See Table I, Appendix *infra*.) None of them were entered in the Tualatin Valley Nurseries Books and records⁵ nor were they reported in the partnership return or in appellant's income tax return for 1947. (R. 635, 640-641, 645-646.)

When the return for 1947 was prepared, appellant asked accountant Lawrence Cook to put as a deduction an item of \$10,000 paid in settlement of a suit for alienation of affections. Cook told appellant that such was not a business expense and that he would not enter it in appellant's return. That was the last return which appellant had Cook prepare. Thereafter appellant took his business elsewhere. (R. 26-30.)

On February 20, 1948, appellant and his wife sold some timber land to Coos-Pacific Timber Company, a wholly owned subsidiary of Dant and Russell, Inc. They had purchased the timberland in 1945 for \$17,000. They sold it for \$55,000. After taking \$140 of certain costs into consideration, the gain amounted to \$37,860. No part of this gain was reported on the partnership or joint return for 1948. (R. 332-336, 339-342, 705-706, 713; Ex. 42, 43.)

⁵ Except for \$1,000 in currency (R. 542, 558), the Tualatin Valley Nurseries books and records for 1947 did not include any records of cash income. Shortly after he started to take care of the nursery records in the first part of 1946, Cook recommended that appellant maintain a cash record. Pursuant to this recommendation Cook set up a daily cash record consisting of duplicate slips. The system was not carried into effect. When Cook requested appellant to keep the cash record, appellant replied that he was a very busy man and did not have time to do it. (R. 39, 40, 55, 61, 63, 64.)

When the agents recomputed the Tualatin Valley Nurseries' net income for 1948, the gain from the sale was treated as earned at the time of the contract of sale on February 20, 1948. Fifty per cent of this or \$18,930 was included as a capital gain. (R. 704-705.)

Pursuant to the contract of sale, Dant and Russell, Inc., made a series of installment payments by check. An itemization of these checks and their disposition may be seen in Table IV, Appendix, *infra*. A \$27,592.98 check dated February 20, 1948, made payable to Leo Elwert was endorsed by Leo Elwert (R. 344) and was deposited to the Leo Elwert and Mary Elwert real estate account in the Tigard Branch of the United States Bank. Mearl Hammond prepared the partnership and joint returns for 1948 without audit (R. 317) and did not include this item. He was not informed of the real estate transaction or of this bank account until 1950. (R. 261, 265, 318-319, 324.)

On August 26, 1948, the Birds-Eye Division of General Foods Corporation issued a check made payable to Leo Elwert for \$1,600. This was in payment of a lease of land. (R. 425-428.) On August 31, 1948, Dant and Russell, Inc., issued a check for \$6,875, as an installment payment on the above mentioned purchase of timber land. (R. 343, 484.) Both of these checks were endorsed by Leo Elwert. Neither of these checks was run through any of appellant's bank accounts. Instead, he took them to Albert A. Asbahr, an attorney at law, who deposited them to his own account. Asbahr in turn issued his own checks to apply upon the pur-

chase of real estate in behalf of appellant. (R. 343, 344, 431, 485-486.)

During 1949, appellant established six new bank accounts. In addition to one collection account,⁶ one checking account⁷ and one savings account⁸ each in his own name, he created three other bank accounts under the names of L. K. Schamburg,⁹ L. C. Albee,¹⁰ and L. K. Albee or G. M. Bloomquist.¹¹ When appellant created the L. C. Albee account on February 25, 1949, he endorsed and deposited a check in the sum of \$7,287.50. (R. 343, 464.) This check represented a part of the capital gain from the sale of timberland to Coos-Pacific Timber Company. (See Table IV, Appendix, *infra*.) When appellant created the L. K. Albee or G. M. Bloomquist account on June 22, 1949, he endorsed and deposited a check in the sum of \$11,334.88. (R. 466, 470, 683-684.) This check included a capital gain from the sale of timberland to Long-

⁶ Opened March 10, 1949, at the Main Branch, First National Bank. (R. 374-375, 383.)

⁷ Opened March 12, 1949, at the Main Branch, First National Bank. (R. 389.)

⁸ Account # 94767, opened July 29, 1949, at the Pacific First Federal Savings and Loan. (R. 476.)

⁹ Account # 94299, opened January 27, 1949, at the Pacific First Federal Savings and Loan. (R. 477-478.)

¹⁰ Account # 94380, opened February 25, 1949, at the Pacific First Federal Savings and Loan. (R. 463.)

¹¹ Account # 94638, opened June 22, 1949, at the Pacific First Federal Savings and Loan. (R. 463, 476-477.)

view Fiber Company.¹² Neither of these two capital gains was recorded on the books. (R. 677, 684.) None of the bank accounts mentioned were made known to the accountant who prepared the returns for 1949. (R. 318-319, 330.)

Two checks in the sum of \$1,600 and \$1,500 were issued by General Foods Corporation on August 24, 1949, and October 19, 1949, respectively. These were in payment for leases on two parcels of land. (R. 425, 429-431.) Neither of these checks was put through the Tigard or Sherwood banks nor was either check recorded on the partnership books. (R. 680-681.) The \$1,600 check together with two other unrecorded checks in the sums of \$453.39 and \$779.97 representing sales of dried prunes and nuts, was cashed at the Pacific First Federal Savings and Loan Association. A cashier's check in the sum of \$2,733.36 was issued to Leo Elwert in their place. (R. 443, 447, 471-472, 681-682, 683.)

Accountant Mearl Hammond prepared the partnership and individual returns for the year 1949. On or about March 12, 1950, he delivered them personally to appellant and his wife and told them that the returns would have to be signed at the bottom of the page. (R. 227-228, 287-291.) Appellant did not file a return of any sort for the year 1949. (R. 423-424.)

¹² On June 24, 1948, Leo Elwert and Mary Elwert bought timber land for \$8,000. On April 18, 1949, they sold it to Longview Fiber Company and received a check for \$11,334.88 which was deposited as indicated above. After the deduction of a \$2 filing fee, the capital gain amounted to 50% of \$3,332.88 or \$1,666.44. (R. 500-509, 683-684, 714-715.)

The returns for all three years were prepared on the cash basis of accounting. (R. 23, 237-238.) Appellant's accountants did not audit his books. In the preparation of the returns for all three years, appellant's accountants used the amount of deposits in the Sherwood and Tigard¹³ banks as the ultimate basis for calculating gross receipts. (R. 18-19, 254, 266, 317.) Neither Lawrence Cook, who prepared the 1947 returns, nor Mearl Hammond, who prepared the returns for 1948 and 1949, were informed of any deposits to other accounts. Nor were they informed of any cash receipts. (R. 19, 30, 58, 59, 220-221.) Cook testified that it was a difficult matter to find out about appellant's financial transactions. (R. 49.)

The Investigation Period

In February, 1951, Deputy Collector William H. Menlow and Special Agent Harold Parsons went to see appellant. (R. 517-518, 622.) They asked to examine his books and records. He told them that his accountant Mearl Hammond had custody of his records and that by going to see him they could obtain whatever records might be required. That same day the agents went to see Hammond and obtained from him all the books, bank statements and cancelled checks for the years 1947, 1948 and 1949. (R. 518-519.)

Upon their return to the office the agents commenced to make a comparison of the records of income with the deposits shown in the bank statements and the records of expense with the cancelled checks. After

¹³ Tualatin Valley Nurseries account only.

several pages of income entries, a total figure was shown and the words "Deposited Sherwood" or "Deposited to Tigard Bank," the date, and the amount. The totals agreed with the deposits made to the bank accounts. (R. 522.) Later additional bank accounts were discovered in the Southeast Portland Branch of the First National Bank, the Bank of California in Portland, and the Pacific First Federal Savings and Loan Association in Portland. (R. 626.) The items deposited therein were found neither to have been recorded in the books and records nor to have cleared through the Tigard or Sherwood banks. The agents could not find any item which had been transferred from any of the above accounts to the Tigard or Sherwood banks. By contacting the makers of the checks the nature of each transaction was learned. (R. 520-524, 533-545, 549-558, 626-632.)

Except for a \$1,000 currency deposit in 1947, no cash was deposited in any of the three years. (R. 542, 558, 615, 616.) Certain invoices from Progressive Printing Company were introduced by the defense as evidence of cash expenditures. (R. 759.) Other than those which were already taken as deductions (R. 615-616) no additional credit was given for any cash expenditures. William H. Menlow testified as follows (R. 615, 616):

I did not take those items or those documents into consideration in the item of cash expenses, because no cash was included in gross receipts.

* * *

The taxpayers have not included any cash in the bank deposits which go to make up the gross

receipts. If the cash did not go in to make income, I could not see where the cash came to pay expenses.

The Trial

After all of the above matters were elicited in great detail, the deficiency was summarized by an expert. The qualifications of H. C. Mytinger were shown to be that he was employed as a technical adviser with the Appellate Division of the Internal Revenue Service in Portland, that his work involved the analysis of tax returns and tax obligations, that he was a certified public accountant in California, that he had been employed by Internal Revenue for almost twenty years and that prior to his employment with Internal Revenue he had engaged in accounting work. (R. 697-698.) Based upon the testimony elicited at the trial, Mytinger testified that Leo Elwert's net income and income tax was reported and corrected as follows (R. 703-716):

Net Income

Year	Reported	Corrected	Additional
1947	\$27,793.94	\$36,503.56	\$ 8,709.62
1948 (Joint)	25,322.74	47,675.07	22,352.33
1949	- 0 -	4,879.12	4,879.12
	<u>\$53,116.68</u>	<u>\$89,057.75</u>	<u>\$35,941.07</u>

Income Tax

Year	Reported	Corrected	Additional
1947	\$10,670.63	\$17,505.78	\$ 6,835.15
1948 (Joint)	5,583.76	15,370.80	9,787.04
1949	- 0 -	657.08	657.08
	<u>\$16,254.39</u>	<u>\$33,533.66</u>	<u>\$17,279.27</u>

As the principal defense appellant sought to show that some amounts of cash were disbursed to itinerant laborers and were not deducted on the returns. Although the defense claimed large amounts of cash so spent and not deducted on the returns, the defense was completely silent as to how the Tualatin Valley Nurseries acquired these sums of cash. Under cross-examination of appellant's witnesses some evidence on this subject was elicited. On Sundays there were numerous customers at the nursery, not a few of whom paid for purchases with currency. (R. 735, 745, 807.) All of these sales of nursery stock (R. 806) "had to go through the packing shed." When questioned as to who received the money, Francis Mendel, the field foreman, testified (R. 808): "The salesmen we had in the packing shed" and Elwert. The customers were not seen to be given receipts. (R. 808.) Mrs. Lillian Helvie, an office worker, testified that (R. 734) "there were lots of cash payments" from customers but there was (R. 735) "no monetary record except what we paid the salesman." She also testified as follows (R. 735):

Q. But you don't know where the cash came from that Mr. Elwert was paying the itinerant workers with?

A. Well, I know that a good deal of the cash was collected right there at the plant. I know that. I knew cash was being kept down in the packing sheds * * *.

Apart from the cash received directly from customers at the packing shed, currency was also received

through the mail. The mail was opened at the Elwert's house and the office workers did not see any of it until after it was opened. Mrs. Helvie testified that she had never seen any of the money records introduced by the defense and she did not have any idea how much money was taken in day by day. (R. 734-735, 738-740.)

SUMMARY OF ARGUMENT

1. The crime of willful attempt to evade and defeat taxes was fairly and correctly charged in the language of the statute. The language "specific intent to evade the tax" does not appear in the statute and is merely descriptive matter used not in indictments but in instructions to the jury. With regard to the third count, the means alleged are surplusage.

2. There was more than ample evidence to support the verdict. The deficiency was established by proof of specific items of unreported income. The jury resolved against appellant the issue as to whether alleged cash expenditures substantially affected the deficiency established. Willfulness was established by the use of many bank accounts, some in different names, and appellant's willful failure to supply his accountants with any information in regard thereto.

3. The charge to the jury was fair and complete.

ARGUMENT

I

**EACH OF THE THREE COUNTS IN THE INDICTMENT FAIRLY
AND CORRECTLY CHARGED APPELLANT WITH A CRIME
AGAINST THE UNITED STATES**

For lack of an allegation that he had a (R. 5) "specific intent to evade the tax" appellant moved to dismiss all three counts upon the ground that none of them stated an offense against the United States. As an additional ground he contended that the third count was barred by the statute of limitations. These same matters were raised subsequently by an objection to the introduction of evidence (R. 2-9), motions for judgment of acquittal (R. 844; Supp. R. 30-33, 38-41), and a motion for arrest of judgment. In each instance appellant's motion was denied. (R. 7, 9, 844; Supp. R. 6, 8, 34, 35, 50.) When denying the motion to dismiss each of the three counts, the trial judge pointed out to counsel how he was confusing the matter of pleading with the separate and distinct matter of instructions on willfulness (R. 7-8):

It is my opinion, Mr. Bischoff, that your motions are not well taken. I think that the specific intent which is an element here relates to the definition of the word "Willfully," and that element is introduced and made applicable when the matter goes to the jury in connection with the instructions as to the meaning of the words as used in the statute and in outlining the elements necessary to be found.

In each of the three counts there is a charge substantially in the language of the statute that appellant (Supp. R. 1, 2, 3) "did willfully and knowingly attempt

to defeat and evade" his income taxes. The statute says nothing about a "specific intent to evade the tax." Clearly the latter allegation is unnecessary in income tax evasion cases, the language of the statute sufficiently informing the defendant of the precise offense with which he is charged so that he may prepare his defense and safeguarding him from a prosecution on the same offense. *Capone v. United States*, 56 F. 2d 927, 930 (C.A. 7th), certiorari denied, 286 U. S. 553; *Himmelfarb v. United States*, 175 F. 2d 924, 934 (C.A. 9th), certiorari denied, 338 U. S. 860; *Rose v. United States*, 128 F. 2d 622, 624 (C.A. 10th), certiorari denied, 317 U. S. 651; *United States v. Rosenblum*, 176 F. 2d 321, 324 (C.A. 7th), certiorari denied, 338 U. S. 893; *Tinkoff v. United States*, 86 F. 2d 868, 875 (C.A. 7th), certiorari denied, 301 U. S. 689; *Heasley v. United States*, 218 F. 2d 86 (C.A. 8th), certiorari denied, November 7, 1955. See generally, Rule 7 (c), Federal Rules of Criminal Procedure, *supra*; *United States v. Bickford*, 168 F. 2d 26, 27 (C.A. 9th); *Todorow v. United States*, 173 F. 2d 439, 447 (C.A. 9th).

The third count of the indictment (Supp. R. 3) alleged that appellant—

did willfully and knowingly attempt to evade and defeat the said income tax owing by him to the United States of America for the said calendar year 1949, by failing to make such income tax return to the said Collector of Internal Revenue, or to any other proper officer of the United States of America, and by failing to pay to said Collector of Internal Revenue, or to any other proper officer of the United States of America, said income tax

and by concealing and attempting to conceal from all proper officers of the United States of America his true and correct gross and net income for said calendar year 1949 * * * (Emphasis supplied.)

Here again it may be noted in the portion underscored that appellant was charged substantially in the language of the felony statute. Section 145(b), *supra*. Completely ignoring the legal effect of the allegation underscored appellant argues that this count does no more than charge appellant with a misdemeanor (Section 145(a)), which is barred by the three year statute of limitations. This argument is predicated upon the false assumption that the specification of means is a necessary part of the indictment and constitutes the gist of the crime charged. All income tax evasion cases hold directly to the contrary.

The means by which tax evasion is attempted need not be specified in the indictment. In *Capone v. United States, supra*, it was said (p. 931):

But it is contended by appellant that the indictment should have specified the means by which he attempted to evade or defeat the payment of the tax. Neither the *Cruikshank* Case nor any other case which we have been able to find supports this contention. In the *Cruikshank* Case it was stated that all rights are not guaranteed by the Federal Constitution, and that therefore, as a matter of law, a charge of conspiracy to defeat a citizen's constitutional right must show that the right threatened is one conferred by the Constitution. In other words, if a certain right is excepted in the definition of the crime, facts must be pleaded to avoid the exception.

But in the instant case there are no exceptions, for the statute says that every attempt to evade or defeat the payment of income tax is a violation of law. What was a question of law in the *Cruikshank* Case, by reason of existing exceptions, is in the instant case a question of fact for the jury because of the absence of exceptions.

Including allegations regarding the means employed is a form of anticipatory pleading. It often obviates a bill of particulars.¹⁴ In *Imholte v. United States* (C.A. 8th), decided November 1, 1955, (1955 C.C.H., Par. 9727) the court referred to Section 145(b) and said:

The statute is drawn in broad general terms. The willful attempt to evade or defeat any tax in any manner is the offense defined. The offense may be committed in any manner so long as there is a willful attempt to evade the tax. It may or may not be committed by the filing of a false or fraudulent return coupled with conduct which brings it within § 145(b). See *United States v. Johnson*, 319 U. S. 503. Hence that part of the indictment which refers to the filing of a false and fraudulent return *is merely a specification of a definiteness and certainly for the defendant's information, in-*

¹⁴ In this case appellant was furnished with a bill of particulars as to each of the three counts. (Supp. R. 10-15.) Referring to the year 1949 and Count III, the bill of particulars stated (Supp. R. 14.):

5. Responding to item 5, defendant concealed or attempted to conceal the alleged adjusted gross income by the use of fictitious bank accounts, by failing to record income on the appropriate books and records, and by other means more peculiarly within the knowledge of the defendant.

incorporated in the indictment originally rather than upon the subsequent order of the court in response to a motion for bill of particulars or to make more definite and certain. (Emphasis supplied.)

Allegations as to the means employed may be treated as surplusage. In *Himmelfarb v. United States*, 175 F. 2d 924, 936, certiorari denied, 338 U. S. 860, this Court said:

The fact that the indictment charged that a false and fraudulent income and victory tax return was filed, is not fatal error. The word "victory" was surplusage and unnecessary to the charge. *The real offense alleged was a willful attempt to evade and defeat a legal income tax.* (Emphasis supplied.)

To the same effect is *Heasley v. United States*, 218 F. 2d 86, 88-89 (C.A. 8th), certiorari denied, November 7, 1955, in which it was said:

The sufficiency of the indictment is challenged because it included a charge that the defendant in his income tax returns willfully and knowingly understated the amount of his adjusted gross income, it being argued that the amount of taxes due from a taxpayer is not dependent upon the amount of his adjusted gross income but such tax is levied upon his net income.

The indictment embodies the words of the statute and ordinarily an indictment for a statutory offense is sufficient where the charge is made in the words of the statute. *The defendant is charged with a willful and fraudulent attempt to defeat and evade a large part of his income tax by understating his adjusted gross income. The indictment*

would have been good had it not embodied the additional charge or information as to the manner in which the evasion was attempted.

* * *

We think this indictment clearly advised the defendant of the facts constituting the offense with which he was charged and a conviction or acquittal would be a bar to a further prosecution for the same offense. (Emphasis supplied.)

For cases affirming judgments of conviction in which the defendant was charged with a willful attempt to evade and defeat income taxes by willful failure to file an income tax return together with other means, see *United States v. Smith*, 206 F. 2d 905, 909 (C.A. 3d); *United States v. Kafes*, 214 F. 2d 887, 890 (C.A. 3d), certiorari denied, 348 U. S. 887; *Sens v. United States*, 212 F. 2d 795 (C.A. 6th), certiorari denied, 347 U. S. 1015.

II.

THERE WAS MORE THAN AMPLE EVIDENCE TO SUPPORT THE VERDICT

By referring to the statement of facts and to the tables (Appendix, *infra*) tracing the unreported partnership income from appellant's hands into various bank accounts, the means by which appellant sought to circumvent the income tax law is readily apparent. Appellant has challenged the sufficiency of the evidence in three ways. He contends as a matter of law that the evidence did not establish (1) any deficiency or (2) willfulness; (3) he also argues that the evidence admitted in proof of (1) and (2) are in fatal variance with the indictment. Although these matters are

argued at great length in his brief (Br. 13-89) they are without merit.

A. The Deficiency

Appellant does not dispute any of the additional partnership receipts established by the Government. Partnership receipts and capital gains amounting to \$23,196.74 in 1947, \$22,537.82 in 1948, and \$9,231.81 in 1949 he admits were not reported on the partnership returns. (Br. Appendix, pp. 1, 3, 5.) However, he contends that unreported expenditures and losses offset the deficiencies established. The argument regarding unreported deductible expenditures is based largely upon testimony regarding cash payments to itinerant laborers. (Br. 20, 22, 33-41.) He also argues that he sustained an unreported deductible loss on a \$22,000 loan to Denton Construction Company (Br. 47, 71) and that the unfiled partnership return for 1949 overstated his income in an amount from \$19,000 to \$20,000 (Br. 24, 32, 51, 66-67, 73).¹⁵

¹⁵ Other alleged expenditures and losses are cited by appellant. He claims other cash expenditures not reported. (Br. 43, 44, 46, 48, 51, 66, 71-72.) The Government's answer to the argument regarding cash expenditure for itinerant labor is applicable to all alleged cash expenditures including those made to Progressive Printing Company.

The choice of the standard deduction in preference to the state income tax deduction (App. Br. 22, 42) was irrevocable. See Sec. 23(aa) (3).

Although appellant has raised some question as to whether they were properly taken into consideration (App. Br. 43, 48, 51) the evidence shows that the following items were actually allowed in full:

Loss on sale of 99 W Motel	\$540.00	R. 699-701
Loss on sale of army truck	550.00	R. 699-701

The argument is unsupported by the evidence or the law. With regard to the cash allegedly expended in the sum of \$20,000 each year and not taken as deductions on the income tax returns, appellant does not explain where the cash came from. He does not contend that it was withdrawn from sources reported as income. Such cancelled checks drawn on the Tigard and Sherwood banks could easily have been put into evidence when cross-examining Cook and Hammond. He makes a weak effort (App. Br. 21, 34) to show that it came from the unreported income represented by the checks "cashed"¹⁶ by Schmidt. These transactions were made by Schmidt only between February 27, 1947, and April 22, 1947. (See Table I, Appendix, *infra*.) Appellant does not explain what he did with the cash between

Interest paid on 99 W. Motel	100.99	R. 704-705
Collection charges paid—1948	9.10	R. 704-705
Collection charges paid—1949	13.00	R. 714-715

Although there was no evidence outside of the partnership return to show that a note obligation in the sum of \$3,000 had in fact been incurred by one Lester McConkey, or that if such a debt existed that it was a non-business debt, or to what extent it became worthless if at all, nevertheless the full amount of the \$1,500 loss claimed on the return was allowed. (R. 721-723.)

With regard to the alleged loss from the capital stock of Producers Gas and Oil Company (App. Br. 47, 67) there was no evidence of the purchase price (R. 312), no schedule in the return showing the details of the alleged loss (R. 306), nor any evidence showing the amount of the alleged loss (R. 720-721). Nevertheless, the \$1,000 loss claimed on the return was allowed in full. (R. 721.)

¹⁶ Schmidt testified that except for one check he did not cash the checks. He simply deposited them and drew checks drawn on his own account. The latter were delivered to Elwert. (R. 165.)

April 22, 1947, and the times when he allegedly used it to pay the harvest hands for picking cherries in June (R. 752), nuts in August (R. 797), and prunes in September (R. 794), and for pruning nursery trees in November (R. 799). Elwert solicited Schmidt's services for the six-week period around March, 15, 1947, and April 15, 1947, when federal and state income taxes fell due. If there was any connection between Schmidt's accommodations at tax return time and Elwert's payments of the itinerant laborers in the summer and fall, the jury apparently did not give much credence to it. Nor has appellant offered any explanation as to the source of the alleged cash expenditures for 1948 or 1949.

There appears to be no direct evidence as to the source of the cash expended. There is circumstantial evidence that whatever cash may have been expended came from cash sales which were not reported as income. This may be inferred from the fact that many cash sales were made (R. 734, 735, 806, 808) and that no cash, except for \$1,000 currency deposited in 1947, was put in the Tigard or Sherwood bank accounts or reported as income (R. 542, 558, 615, 616). If these cash sales be accepted as the logical source of the cash expenditures, and it is submitted that they are, then whatever cash expenditures there may have been are completely offset by the unreported cash income. This leaves unaffected the deficiency consisting of unreported income from the checks deposited in the various bank accounts.

Appellant argues (Br. 47, 71) that he suffered a loss of \$22,000 on three notes (R. 495-496) which was not deducted on his return. The alleged notes were not introduced. Albert W. Denton, the borrower, was not called to testify. No explanation was given as to why the notes were not introduced or why Denton was not called to testify. The only evidence of this alleged loss consists of the testimony of Asbahr. When questioned as to the nature of the funds loaned, Asbahr testified (R. 498) "Some of it was checks and some of it was cash." Asbahr was questioned as to how he had notified Elwert of the alleged loss. He testified as follows (R. 498):

By Mr. Luckey:

Q. Mr. Asbahr, with reference to this Denton Construction Company matter, did you furnish Mr. Elwert with a letter regarding the worthlessness of that loan?

A. I don't think so.

Q. Do you recall whether or not in 1950 you might have written him such a letter?

A. No, I wouldn't remember that now.

Upon the basis of such flimsy testimony, appellant argues (Br. 47, 52) that the established deficiency for the years 1948 and 1949 was offset. If for the purposes of the alleged loan any checks had in fact been drawn on residuaries of reported income it would have been simple enough to have introduced evidence in regard to them. Hammond had all records pertaining to the two known accounts at the Tigard and Sher-

wood banks. (R. 330.) He could readily have been cross-examined as to any checks drawn on these funds. From the fact that such evidence was not introduced it was reasonable for the jury to infer that no such checks were in fact drawn on reported income depositaries. If such a loan was made, it must have been made from sources of unreported income. Had it been withdrawn from any of the banks shown as residuaries of unreported income such could readily have been established. Although funds were allegedly advanced in the sums of \$2,200 on February 21, 1948, \$18,000 on February 24, 1948, and \$2,000 on March 18, 1948, (R. 496) no withdrawals in these or any approximate amounts were shown to have occurred at or near any of these dates. Here again the argument leaves unaffected the deficiency established by the Government.

Appellant asserts (Br. 51, 66-67) that Hammond overstated receipts in the 1949 return, that upon re-examination of the books of account he discovered an overstatement of income between \$19,000 and \$20,000, and that he was unable to reconcile the returns with the records. Hammond's clarified testimony on redirect examination indicated that his knowledge of the alleged overstatement of gross receipts was not based on any re-examination of the books which he himself had conducted. Instead, the issue of any discrepancy was first called to his attention by the revenue agents. (R. 326.) But the amount of the alleged discrepancy was based upon hearsay remarks by one Mr. Eiseman. (R. 322-324.) Appellant did not call Mr. Eiseman to testify as to his findings. Except for this hearsay there is no

evidence to establish the amount of the alleged discrepancy. The jury was instructed (R. 856) "the first essential element is that there was owing to the Government of the United States by the defendant a substantial income tax for the taxable year of 1949." The jury resolved this issue against appellant.

In *Gendelman v. United States*, 191 F. 2d 993, 996, certiorari denied, 342 U. S. 909, this Court said:

While the government had the duty to prove guilt beyond a reasonable doubt, it was not required to prove the exact amounts of unreported income. Skillful concealment can not be made an invincible barrier to proof. *United States v. Johnson*, 1943, 319 U. S. 503, 517, 63 S. Ct. 1233, 87 L. Ed. 1546. Proof of the amounts of the appellant's income need not measure up to the amount stated in the indictment. *Gleckman v. United States*, 8 Cir., 1935, 80 F. 2d 394, certiorari denied, 297 U. S. 709, 56 S. Ct. 501, 80 L. Ed. 996. What is necessary to take a case of this kind to the jury is a showing that a taxpayer had income which he deliberately failed to include in his return. *Schurman v. United States*, *supra*, 174 F. 2d at page 399. Whether such a showing had been made at the close of the government's case was to a great extent dependent upon the credibility of the government's witnesses.

In *Canton v. United States* (C.A. 8th), decided October 20, 1955 (1955 P-H, par. 72,983), the Court of Appeals affirmed a judgment of conviction for income tax evasion. At the trial and upon appeal the defendant asserted certain expenditures as deductions although they had not been claimed on his income tax

return. The appellate court approved the ruling of the trial court. In sustaining the trial court's denial of the defendant's motion for judgment of acquittal the Court of Appeals said:

We agree with the trial court that the defendant was not entitled to these unclaimed deductions as a matter of law. (Emphasis supplied.)

In *Clark v. United States*, 211 F. 2d 100, 103 (C.A. 8th), certiorari denied, 348 U. S. 911, the court said:

The Government is not required to establish income-tax evasion by the same processes and formalities which a taxpayer is required to observe in making his return. The existence of unreported income may be demonstrated by any practical method of proof that is available on the circumstances of the particular situation. Cf. *Burka v. Commissioner* (4 Cir.), 179 F. 2d 483, 485. And it is not necessary, in order to make a case of tax evasion, that the exact amount of such income should be established. *United States v. Johnson*, 319 U. S. 503, 517, 63 S. Ct. 1233, 87 L. Ed. 1546. Nor is it incumbent upon the Government, in making a *prima facie* case of evasion to prove the non-existence of any other deductions than those which the taxpayer has claimed in his return. *United States v. Link* (3 Cir.), 202 F. 2d 592, 593, 594. If the taxpayer legally has other deductions than those which he has so claimed, it is his privilege to show them and explain them as part of his defense. * * * *It does not therefore destroy the Government's prima facie case as a matter of law that the defendant is able to develop on cross examination of the Government's witnesses that a right to other deductions may exist,*

or to establish by his own evidence that such deductions do in fact exist, and especially is this true where the unreported income pointed to by the Government's evidence is reasonably capable of being found to have exceeded the amount of the unclaimed deductions. (Emphasis supplied.)

To the same effect, see *Stayback v. United States*, 212 F. 2d 313 (C.A. 3d), certiorari denied, 348 U. S. 911; *Bender v. United States*, 218 F. 2d 869 (C.A. 7th), certiorari denied, 349 U. S. 920.

B. Willfulness

Appellant contends that there was no evidence indicating knowledge of the falsity of the returns for 1947 and 1948 or of the failure to file the 1949 return (Br. 13, 23-31); that there was no evidence of a willful attempt to evade and defeat the taxes (Br. 16, 52-74); and that the inaccuracies in the returns were due to incompetence of his accountants (Br. 14, 15, 21-22).

The argument is without merit. Appellant did not give receipts for cash which he received from customers to whom he made cash sales. He used the house and the shed rather than the office in which to handle cash. He did not have the office helper record the daily receipts. (R. 734-735, 738-740, 745, 806, 807, 808.) He did not keep a record of cash expenditures. (R. 38, 256.) Except for \$1,000 in 1947, he did not deposit any cash to his bank accounts. (R. 542, 558, 615, 616.)

It is contended (Br. 20) that appellant was compelled to have in his possession large sums of cash in

order to pay itinerant farm labor. There is no reason why he could not have deposited cash sales receipts into a proper bank account and made appropriate lump sum withdrawals therefrom to pay the help. In this way, with his system of having the accountants rely upon the bank deposits and checks drawn thereon, he could have maintained an adequate record of both receipts and expenditures.

In *Maxfield v. United States*, 152 F. 2d 593, 597, certiorari denied, 327 U. S. 794, this Court said:

We are asked to hold that there is no evidence of willful intent to evade the tax, it being claimed that the showing does not measure up to the standards set in *Spies v. United States*, 317 U. S. 492, 63 S. Ct. 364, 87 L. Ed. 418.

* * * There is * * * competent evidence that they failed to maintain adequate records, the only books kept being a cash journal derived from check stubs, bank statements, and deposit slips. * * * large sums of money were not put through any bank account. * * *

We are satisfied that the evidence of willful intent was sufficient to carry the case to the jury. The question of willfulness is one of fact, *Arnold v. United States*, 9 Cir., 75 F. 2d 144; and direct proof of wrongful intent is not necessary to establish guilt in cases of this character, *United States v. Commerford*, 2 Cir., 64 F. 2d 28; *Capone v. United States*, 7 Cir., 51 F. 2d 609. (Emphasis supplied.)

Appellant diverted income away from the bank accounts known to his accountants. He used a false ad-

dress and telephone number when establishing one new bank account. (R. 107, 179-180.) He avoided going to the bank himself. Instead he had his friend A. D. Schmidt do his banking for him at the Portland Branch of the Bank of California. While Schmidt did the banking Elwert waited one block away at the brokerage house. (R. 158-187.) He established several accounts in names other than his own, namely, L. K. Schamburg, L. C. Albee, and L. K. Albee or G. M. Bloomquist. He opened and closed bank accounts within short intervals. For example, the account at the Portland Branch of the Bank of California was opened on March 12, 1947, and closed on August 22, 1947. (R. 199, 204). His account in the Southeast Portland Branch of the First National Bank was opened on January 14, 1947, and closed on January 23, 1948. (R. 104, 111.) His account at the Citizens Branch of the United States National Bank was opened on February 1, 1947, and closed on January 13, 1948. (R. 348.) Six weeks, the shortest period of all, was the life of his checking account at the main office of the First National Bank. This account was opened on March 12, 1949, and closed on April 21, 1949. (R. 389.) He did not make any transfers between the two principal bank accounts at the Tigard and Sherwood banks and the other bank accounts. (R. 520-524, 533-545, 549-558, 626-632.) From his Tigard and Sherwood bank statements and checks it was therefore impossible for his accountants to detect any other bank accounts. All of these acts amount to attempts to conceal his assets. In *Remmer v. United States*, 205 F. 2d 277, 288, remanded on other grounds,

347 U. S. 227, reaffirmed, 222 F. 2d 720, certiorari granted on October 10, 1955, this Court said that willfulness could be inferred from "the concealment of the ownership of property."

Appellant furnished his accountants with bank statements and cancelled checks on the two principal accounts in the Tigard and Sherwood banks. (R. 18-19, 254.) But he did not furnish his accountants any information whatsoever on the other bank accounts. (R. 19, 317.) The accountants are said to have been incompetent. (Br. 14, 15.) In *Norwitt v. United States*, 195 F. 2d 127 (C.A. 9th), the appellant argued as here that there was no competent evidence of willfulness. In that case, as well as in this case, financial information was withheld from the bookkeepers. This Court said (p. 132):

It is hornbook law that the Government need not adduce direct proof of intent. It may be inferred from the defendant's acts. This principle has been repeatedly applied in income tax cases.

* * *

** * * Norwitt was not entitled to rely on the income computed by his accountant when he withheld from him the information whence that income could have been correctly determined. (Emphasis supplied.)*

To the same effect, see *Bateman v. United States*, 212 F. 2d 61, 68, where this Court said that the accountant, "however competent, could not report income of which he had no knowledge."

Appellant demanded that Cook take a deduction on his income tax return for the amount paid in settlement of a suit for alienation of affections. When Cook refused to take this non-business deduction, appellant took his business elsewhere. (R. 27-28, 30.) His demanding a deduction to which he clearly was not entitled and then terminating the accountant's services upon the latter's refusal to comply with his wishes could be construed as an attempt to evade taxes and to remove anyone who stood in his way. Despite this evidence appellant argues (Br. 61) that he did not take deductions to which he was entitled and that this shows that he did not have any predisposition to evade taxes. This argument does not ring true. It is quite possible that cash disbursements were not revealed to the accountants for fear that it might entail disclosure of cash sales in larger amounts. Also, as was said in *Clark v. United States*, 211 F. 2d 100, 103 (C.A. 8th), certiorari denied, 348 U. S. 911:

Some times the failure to claim deductions in a return may well be a part of the taxpayer's scheme to cover up his unreported income as a matter of not creating suspicion on the face of his return.
 * * * In any event, the attempt to establish unclaimed deductions as a defense against fraud in misstating income will ordinarily of itself present merely a question of fact, first as to the existence and amount of such deductions, and further, as suggested above, as a possible ingredient in the taxpayer's intent to conceal his unreported income by partially neutralizing the face of his returns.

Inasmuch as he did not prepare or sign the partnership return for 1947, appellant argues (Br. 24-25) that there is no evidence that he had knowledge of its contents or its falsity. This argument overlooks the evidence concerning Leo Elwert's part in the non-rendition of data which should have gone into the 1947 partnership return. Cook had spoken to Leo Elwert many times about the necessity of keeping records in order to show a correct financial picture. Some of these conversations are mentioned in appellant's brief. (Br. 33, 62-64.) After Cook had accumulated all the information that he could from the bank statements and before the partnership or individual returns were prepared, Cook usually consulted Leo Elwert regarding his financial transactions during the year and asked (R. 48): "Now what else? What other transactions have you had for the year?" Despite these efforts on the part of the accountant, substantial omissions of income were made on the 1947 partnership return. When appellant signed¹⁷ his individual return for 1947, he must have known that it was false. This he must have known from the fact that he had kept away from Cook all information regarding his having made deposits to the Southeast Portland Branch of the First National Bank and to the Portland Branch of the Bank of California in the total amount of \$23,196.74. (R. 19; see Table I, Appendix, *infra*.) This sum is too large to have been an oversight. And he must have

¹⁷ His return for 1947 bears what purports to be his signature. (Ex. 1; R. 12.) This signature constituted *prima facie* evidence that the individual return was actually signed by him. No evidence was introduced to rebut this presumption.

known that on his individual return his distributive share of the partnership income did not reflect any part of this amount.

It is asserted (Br. 15, 29-30) that the Government's evidence establishes that (1) Hammond prepared the returns for the year 1949, (2) that he did not deliver them to appellant for signature and filing, and (3) that Hammond retained possession of the returns until they were found in his possession by the Internal Revenue Agents. Of these three statements only the first is completely supported by the evidence. (R. 225.) The second statement is directly contrary to Hammond's uncontradicted testimony which was as follows (R. 227, 228):

Mr. Luckey: Q. Now, what did you do with those returns after you had prepared them?

A. I delivered them to the nursery myself in person. Possibly the reason for delivering up there in person, at that time, as I recall, it was about March 12th, and we were pretty close to the deadline. Otherwise I might have mailed them.

Q. Who was present when you delivered them?

A. Leo and Mary Elwert.

* * *

Mr. Mead: Did you deliver these to Mr. and Mrs. Elwert at the home there or at the office?

A. Yes, at home.

Mr. Mead: What time of day was it?

A. It was in the evening about 8:00 or 8:15, as I recall.

As to the third statement, while it is true that the returns were found in Hammond's possession (R. 577), it could not be true that they were in Hammond's possession during the time that the returns were in the Elwert's possession.¹⁸

Simply because the prepared tax returns for 1949 showed no tax liability, it is argued (Br. 15) that the failure to file the return could not have been done with intent to evade the tax. This is a non-sequitur. As compared with the previous year's showing of substantial income, to file a non-taxable return in 1949, he might have feared, would arouse suspicion and invite investigation. If such were his thoughts he might have considered inactivity and silence the most likely way of evading detection.

Appellant has argued that other matters prompted his acts of concealment. He says for example (Br. 59) that the carrying of the various bank accounts was prompted by the difficulties that stemmed from the suit for alienation of affections. It is difficult to see how there can be any connection between the suit for

¹⁸ Between March 12, 1950, when the returns were first delivered to the Elwerts and February, 1951, when the Internal Revenue Agents obtained the records from Hammond, Hammond had come into possession of the returns in some way. The record is silent as to how the returns got from the Elwerts to Hammond. The Elwerts' home was near the office. In the office there was a large box of records which Hammond came to pick up from time to time. (R. 257.) Elwert could very easily have taken the returns from the house to the office and left them in the large box of records. The next time that Hammond picked up the box of records he would have taken the returns too. This is a far cry from saying that the returns were never delivered to the Elwerts.

alienation of affections which was settled on March 14, 1947 (R. 156), and the establishment of six new bank accounts in 1949 (Statement of facts, *supra*). Even if other difficulties did prompt some of his highly evasive activities, this would not absolve him of criminal responsibility for tax evasion. In *Spies v. United States*, 317 U. S. 492, 499, the Supreme Court said:

If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.

In this case there are several items of evidence apart from the default in filing the return and paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the name of others of his family, and kept inadequate and misleading records. *Petitioner claims other motives animated him in these matters. We intimate no opinion. Such inferences are for the jury.* If on proper submission the jury found these acts, taken together with willful failure to file a return and willful failure to pay the tax, to constitute a willful attempt to defeat and evade tax, we would consider conviction of a felony sustainable. (Emphasis supplied.)

C. The Variance

On March 15, 1948, Leo Elwert filed an individual tax return for the year 1947 in which he reported one-half of the reported partnership income. (Ex. 1,

2; R. 12, 22.) On May 9, 1949, Leo Elwert and Mary Elwert filed a joint return for the year 1948. (Ex. 42; R. 212-214.) For the year 1949, Leo Elwert did not file a return of any kind. (R. 423-424.) On November 20, 1953, the indictment was filed charging appellant in each count with a willful attempt to evade his income taxes. (Supp. R. 1-4.) Without opposing appellant's written motions for bills of particulars, the Government supplied bills of particulars which set out certain unreported gross income items. The bill of particulars relating to 1947 and 1948 was filed on December 28, 1953. This did not specify whether these items of unreported income were those of the partnership or those attributable to appellant individually. (Supp. R. 10-12.) The bill of particulars relating to 1949 was filed on January 22, 1954. This referred to "the concealed gross income of the defendant." (Supp. R. 13.) The indictment and bills of particulars showed unreported income in varying amounts. The figures¹⁹ are as follows (Supp. R. 1-3, 10-15):

Unreported Income

Year	Indictment	Bill of Particulars
1947	\$12,028.92	\$24,057.84
1948	21,716.48	23,477.08
1949	9,007.81	9,610.10

¹⁹ The figures shown under the column entitled "Indictment" were obtained by subtracting the alleged reported income from the alleged corrected income. The figures shown under the column entitled "Bill of Particulars" were obtained simply by adding for each year the itemized amounts shown.

Although the figures were in obvious disagreement appellant did not request a supplemental bill of particulars. At the trial appellant objected to the introduction of any evidence concerning unreported partnership income. (R. 12-14, 20-21.) Although the trial judge asked for some authority in support of appellant's objection (R. 76) no case in point was produced the following morning of the trial (R. 79-80). Appellant contends (Br. 74-82) that the trial court erred by admitting the evidence.

The argument is one of form rather than substance. It is conceded that it would have been better form had the bills of particulars for the years 1947 and 1949²⁰ specified that the items represented unreported income of the partnership and that appellant's unreported income consisted of his distributable share which was one-half thereof. But appellant has not shown how he was injured. He did not claim surprise or request a continuance. He has not shown how he was misled in any way.

On the face of the record on December 28, 1953, he had good reason to believe that the items shown in the first bill of particulars represented additional income to the partnership. This should have been apparent to him even though not so designated. For the year 1947, he was charged with a willful attempt to evade a tax on unreported income (Supp. R. 1-2) which amounted

²⁰ For the year 1948, there was no variance of any consequence. The amounts shown as unreported income in the indictment and bill of particulars were in substantial accord with one another (Cf., *supra*, p. 40) and with the figures established at the trial (*supra*, p. 15).

to exactly one-half of the items shown in the bill of particulars (Supp. R. 10-11). The ratio was the same as his distributable share to the total of the partnership income. (Ex. 1, 2; R. 12, 22.) It is difficult to see how he could possibly have been misled as to the portion applicable to him or in any other way.

In *Goldbaum v. United States*, 204 F. 2d 74, 78, remanded, 348 U. S. 905, reaffirmed, 222 F. 2d 360, this Court said:

In considering the question of variance, we bear in mind what was stated in *Berger v. United States*, 295 U. S. 78, 82, 55 S. Ct. 629, 630, 79 L. Ed. 1314, as follows: "The true inquiry, therefore, is *not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused.* The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." (Emphasis supplied.)

In *United States v. Rosenblum*, 176 F. 2d 321 (C.A. 7th), certiorari denied, 338 U.S. 893, it was argued that there was a variance between the use of the word "dividends" alleged as income upon which the tax was evaded, and the proof of receipt of over-ceiling prices from the sale of whiskey. The court said (p. 324):

We cannot accede to this contention. We state our reasons briefly. A variance is not regarded as material unless it is of such a substantive character as to mislead the accused in preparing his defense or place him in second jeopardy for the same offense. * * * [citing cases] In the state of this record, there can be no question as to each defendant being protected against another prosecution for the same offense, and it is clear that he was not surprised in any way by the character of the evidence to be adduced. Here, the gravamen or the essential ingredient of the charge was the willful attempt to evade and defeat the tax. The statute says that every attempt to evade or defeat the payment of income tax is a violation of the law. It is sufficient to charge a defendant with acts coming within the statutory description in the substantial words of the statute. * * * [citing cases] In our case, the character of the offense with which each defendant was charged, was not changed by the use of the word "dividends." The indictment set forth the facts which made up the charge against each. He was still charged with a willful attempt to evade and defeat the payment of his income tax. * * * [citing cases] *Hence, that part of the indictment which gave the breakdown of the gross income and allowable deductions was surplusage or a mere defect or imperfection in form which did not tend to the prejudice of each defendant, and as such, need not be proved. (Emphasis supplied.)*

Accord: *Himmelfarb v. United States*, 175 F. 2d 924, 936 (C.A. 9th), certiorari denied, 338 U. S. 860 (failure of proof as to alleged "victory" tax return held to be an immaterial variance); *Barcott v. United States*,

169 F. 2d 929, 932 (C.A. 9th), certiorari denied, 336 U. S. 912 (contention of a variance between restaurant business alleged to be source of income and proof regarding a record of safety deposit entries, held to be without merit); *Burke v. United States*, 58 F. 2d 739, 741 (C. A. 9th) (victim bank known by two names may be alleged as either).

With regard to the year 1949 the indictment and bill of particulars charged appellant with willfully evading a tax on an amount (Supp. R. 3) twice as much as that established at the trial (*supra*, p. 15). It is submitted that the variance in amount was not material. In *Goldbaum v. United States*, 204 F. 2d 74, remanded, 348 U. S. 905, reaffirmed, 222 F. 2d 360, this Court said (p. 78):

The evidence relating to the gambling syndicate would disclose that total income was greater than this amount [reported income] by at least \$29,060.75. This would fall far short of the allegation of \$3,658,469.75, but so far as the indictment itself is concerned, this falling short of the proof of the larger cannot be said to constitute a variance either material or prejudicial.

Accord: *Gendelman v. United States*, 191 F. 2d 993, 996 (C.A. 9th), certiorari denied, 342 U. S. 909; *Maxfield v. United States*, 152 F. 2d 593, 597 (C.A. 9th), certiorari denied, 327 U. S. 794.

The cases cited by appellant may be distinguished or are inapplicable, In *Hartman v. United States*, 215 F. 2d 386 (C.A. 8th), the defendant was charged with failing to include in taxable income funds transferred

from his wholly owned corporation and deposited in his individual account. The trial court permitted evidence of his organizing and carrying on a family partnership which increased the number of taxpayers in respect to Government war contract profits. Obviously there was no relation between the two. The latter should have been excluded as irrelevant and prejudicial. In *Epstein v. United States*, 174 F. 2d 754 (C.A. 6th), a mail fraud case, there was a failure to prove any active fraud, an essential ingredient to the crime charged. *Levin v. United States*, 5 F. 2d 598 (C.A. 9th), does not involve any variance problem. In *United States v. Neff*, 212 F. 2d 297 (C.A. 3d), a second supplemental bill of particulars was filed on the day after the trial commenced. The defendant was taken by surprise and asked for a ten day continuance which was denied. This of course breached the rule that (p. 310) “ ‘The purpose of a bill of particulars is to enable the accused to avoid surprise, and to enable him to prepare for trial.’ ”²¹ In *Bryan v. United States*, 175 F. 2d 223 (C.A. 5th), a net worth and expenditures case, there was a failure to negate the probability of prior accumulated funds. Of course the failure to prove the deficiency was fatal. In the case at bar there was no effort by the prosecution to bring in evidence of any crime than the one charged for each of three years. In proving appellant's distributive share of the unreported partnership income there is nothing unrelated or prejudicial in first proving

²¹ Quoting from *Hughes v. United States*, 114 F. 2d 285, 288 (C. A. 6th).

the unreported partnership income. That was essential.

Appellant has cited (Br. 82-89) *Holland v. United States*, 348 U. S. 121 and other cases involving indirect proof. These cases are inapplicable to the case at bar which involved direct proof of tax evasion by specific items of unreported income.

In *Papadakis v. United States*, 208 F. 2d 945, 948, this Court said:

In determining whether the evidence was sufficient to sustain the verdict we view the record in the light most favorable to the government and affirm if the evidence, so viewed, was sufficient to justify the jury in finding, beyond a reasonable doubt, that there has been a willful attempt to evade taxes. *Gendelman v. United States*, 9 Cir. 191 F. 2d 993, 995, certiorari denied, 342 U. S. 909, 72 S. Ct. 302, 96 L. Ed. 680; *McFee v. United States*, 9 Cir., 206 F. 2d 872, 874.

To this same effect are *Schino v. United States*, 209 F. 2d 67, 72 (C.A. 9th), certiorari denied, 347 U. S. 937; *Remmer v. United States*, *supra*, 205 F. 2d 277, 286, remanded on other grounds, 347 U. S. 227, reaffirmed 222 F. 2d 720, certiorari granted on October 10, 1955. Taking the evidence in the light most favorable to the Government there was more than ample evidence to support the verdict.

III

THE TRIAL COURT'S INSTRUCTIONS DEFINING WHAT CONSTITUTES A WILLFUL ATTEMPT TO EVADE AND DEFEAT TAXES, TAKEN AS A WHOLE, WERE FAIR AND COMPLETE

A. In General

Appellant argues (Br. 104-106, 109-110) that the court failed to define the elements of the crime. In particular it is contended (Br. 106-107) that the court erred in failing to instruct the jury that appellant was not charged with filing a false partnership return, and (Br. 109-110) that he did not have the burden of proving his innocence.

The argument is without merit. A reading of the introductory remarks by the trial judge²² will show

²² The court charged the jury as to the elements of the crime as follows (R. 854-857):

Now the essential elements of the offense charged in Count 1 are: First, that there was owing to the Government of the United States substantially more income tax than was shown in the return of the defendant for the taxable year 1947.

Second, that the defendant knew there was owing substantially more income tax than that shown in said income tax return.

Third, that the defendant willfully attempted to defeat or evade part of such tax by filing or causing to be filed a false return knowing said return to be false.

Now, the essential elements are the same with respect to the offense charged in Count 2 of the indictment except that the taxable year there involved is the calendar year 1948.

When you come to consider Count 3 of the indictment you will find, as I indicated before, that it varies and is different from the other two. I instruct you that the essential elements of the offense charged in Count 3, as I have stated, are different, and principally they are different because the tax evasion charged against the defendant in Count 3 of the indictment allegedly resulted by virtue of his failing to make an income tax return rather than filing a false one. That is the allegation in the first two counts. In the third count the evasion allegedly results from his failing to file

that he instructed the jurors that there must be a substantial tax due, that such must be known, and that there must be a willful attempt to evade the tax. The judge also instructed the jury that the partnership

an income tax return, and not only by failing to file but, in addition, by concealing and attempting to conceal his true and correct gross income and net income and likewise the tax. The essential elements of the offense charged in Count 3, therefore, are different and I will name them for you:

The first essential element that you must find beyond a reasonable doubt as to the third count—and all these elements must be found beyond a reasonable doubt before the defendant can be found guilty of the third count—the first essential element is that there was owing to the Government of the United States by the defendant a substantial income tax for the taxable year of 1949.

Second, that the defendant knew that he owed to the Government of the United States a substantial income tax for the taxable year of 1949.

Third, that the defendant knew that he was required by law to make an income tax return on or before March 15th, 1950, to the Collector of Internal Revenue at Portland, Oregon, for the taxable year of 1949.

Fourth, that he willfully and knowingly failed to file a return and to pay said tax.

Fifth, that the failure to file such income tax return and to pay said tax was with the specific intent to evade the payment of said tax; that is to say, that he intentionally and deliberately refrained from filing the return and paying the tax for the purpose of cheating and defrauding the Government of revenue legally due to the Government.

Lastly—this is as to the third count—and in addition thereto, the defendant concealed and attempted to conceal from the United States his true and correct gross and net income for that tax year.

As I have already stated to you, the burden is upon the plaintiff, that is the Government, to prove each and every one of the essential elements which constitute the offense under each of the three counts of the indictment beyond a reasonable doubt. If you entertain a reasonable doubt as to any one of the elements necessary to constitute the offense charged as to any one of the counts of the indictment, your verdict must be for the defendant as to any count as to which you find there is a reasonable doubt.

income is not subject to tax and that the partners pay income tax in their individual capacities. (R. 864). In view of the court's repeated instruction that there must be owing substantially more income tax than reported, the jurors could only have understood that the crime charged was that of tax evasion. The instructions given as to the burden of proof were clear.²³

²³ See last paragraph to preceding fn.

In other parts of the instructions, the court charged the jury as follows (R. 848-849, 867) :

* * * the law presumes every defendant to be innocent until he is proven guilty by the evidence beyond a reasonable doubt. And this presumption is not a mere matter of form, but is a substantial right of every defendant, and this presumption continues throughout the entire trial and until such time as you have found it has been overcome by the evidence beyond a reasonable doubt.

Thus, a defendant, although accused, begins the trial with no evidence against him. The law permits nothing but legal evidence presented before the jury to be considered in support of a charge against him. The presumption of innocence alone is sufficient to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

I have used this term "reasonable doubt." A reasonable doubt is a doubt based upon reason and common sense and arising from the state of the evidence. A reasonable doubt exists in any case when, after a careful and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty that a defendant is guilty as charged. A reasonable doubt may arise not only from the evidence produced but also from the lack of evidence. Since the burden is upon the Government, the prosecution or plaintiff, to prove the accused guilty beyond a reasonable doubt of every essential element of the offense charged, a defendant has the right to rely upon the failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of a witness for the Government. The law does

Appellant contends that the court inadequately instructed the jury on the legal effect of deductible expenses (R. 113-114, 116) and on his individual tax liability (R. 110-111).

The argument is without merit. The judge instructed the jury that net income was the difference between gross income and the deductions allowed by law. (R. 864-865.) This is in accordance with the statutory law. Section 21(a), Internal Revenue Code of 1939. A reading of the court's instructions on the interrelation between partnership and individual income²⁴ is a fair

not impose upon a defendant the duty of producing any evidence.

* * *

You are instructed that the defendant is not required to take the stand and to give testimony, and if the defendant does not take the stand and testify you are not to draw any adverse inference from that fact.

²⁴ The trial court's instructions regarding a partner's distributable share of partnership net income and the necessity that such share be reported on his own individual income tax return are as follows (R. 863-864) :

You are instructed that where an individual taxpayer is a member of a partnership, income received by the partnership as the result of the partnership business does not in and of itself become income of an individual partner. For example, if the partnership received \$100 in payment for merchandise sold by the partnership, neither the \$100 nor any part thereof nor the profit involved therein, if any there should be, or any part thereof, would constitute either gross or net income to the individual partner. The individual partner is only chargeable with his distributive share of the net profits of the partnership determined from the operation of the partnership business for the entire taxable year. If the partnership has realized a net profit at the end of the tax year an individual partner is chargeable with his distributive share of the partnership net income; that is, it is that part of the partnership net

statement of the law. Sections 181-183, Internal Revenue Code of 1939.

B. Willfulness

There was much testimony regarding appellant's willful failure to keep records. Those portions of the testimony referring to appellant's failure to keep records of cash expenditures are set out in his brief. (Br. 62-64, 66-67, 92.) Appellant's willful failure to keep records of receipts was proved in much greater detail. This consisted largely of the proof of many checks representing nursery sales which were not entered in the records of the partnership nor deposited in the banks from whose records the partnership income was determined and reported. (See Statement of facts, *supra*, pp. 7-13.)

The Tualatin Valley Nurseries' income did not arise solely from selling nursery stock and fruits. In fact

income which then becomes the gross income of the individual partner.

When the individual partner makes his income tax return, he must include as a part of his gross income his distributive share of the partnership income, to which he must add any individual income that he may have earned during the tax year. The total of these items constitute his gross income, and the difference between that amount and the total of his own deductions and exemptions allowed by law becomes then the individual taxpayer's taxable income upon which the income tax liability must be computed and paid.

You are instructed that partnerships as such are required by law to file partnership income tax returns, regardless of the amount of its net income, but the partnership itself is not subject to and is not required to pay any income tax. The partners only are required to pay income tax in their individual capacities upon the partners' distributive share of the partnership income.

none of the \$22,462.42 unreported income for 1948 came from such sources. Instead it was composed of a capital gain from the sale of timber land to Coos-Pacific Timber Company, interest on a savings account at Pacific First Federal Savings and Loan, a lease of land to the Birds-Eye Division of General Foods Corporation, interest payment by Dant and Russell, Inc., on an installment payment contract, and interest payments by E. Miles Maxwell on another installment payment contract. (See Table II, Appendix, *infra*, p. 67.) In 1949, additional interest payments were received from Dant and Russell, Inc., and E. Miles Maxwell on their respective installment payment contracts, additional rental payments were received from Birds-Eye Division of General Foods Corporation, and more interest was earned on the Pacific First Federal Savings and Loan account. Also a capital gain was realized in the sale of timber land to Longview Fiber Company. None of this income was reported. (See Table III, Appendix, *infra*, p. 68.) The circumventive and exclusive tactics used to direct this income away from the usual records have already been shown. (*Supra*, pp. 7-13.)

The trial judge instructed the jury as follows (R. 857, 859):

To constitute concealment or an attempt to conceal the Government must establish beyond a reasonable doubt that the defendant committed *some affirmative act for the purpose of concealing his true net income and tax liability* in addition to the failure to file the return, and *that it was with*

the specific intent to evade a tax liability legally due.

*

*

*

Every person subject to income tax, except persons whose gross income consists solely of salaries or wages for personal services, or arise solely from farming, is required to keep such permanent books of account or records, including inventories, as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any income tax return.

With respect to the offenses charged in this case, *proof of specific intent is required*, before there can be a conviction. Now “specific intent,” as the term suggests, means more than a mere general intent to commit the act. *A person who knowingly does an act which the law forbids, or who knowingly fails to do an act which the law requires, and purposely intending to violate the law, acts with specific intent.*

To state the matter in other words, *the intent required* under the statute here involved is not inherent in the act itself, but *must be established beyond a reasonable doubt by the evidence other than the act of the filing of a return that is false or the failure to file a return.* (Emphasis supplied.)

As though “handling of one’s affairs to avoid making the records usual in transactions of the kind” (*Spies v. United States*, 317 U. S. 492, 499) was a matter foreign to tax evasion, appellant argues (Br. 90-94) that the judge erred in his remarks regarding the duty to keep records. It is thus contended that he was not

charged with willful failure to keep records and that even if this be a part of the prosecution's case the court erred in not making it clear that the failure to keep records must be willful. It is also contended (Br. 117-119) that the court erred in not telling the jury that incomplete records maintained through carelessness would not constitute tax evasion.

The Supreme Court has expressed a view that the matter of keeping records is very pertinent in a tax evasion case. In *Spies v. United States*, 317 U.S. 492, 496, 499-450, the Supreme Court said:

* * * the willful failure to make a return, *keep records*, or supply information when required, is made a misdemeanor, without regard to existence of a tax liability. § 145(a). Punctuality is important to the fiscal system and these are sanctions to assure punctual as well as faithful performance of these duties. * * *

* * * Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished "*in any manner*". By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double

set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, *handling of one's affairs to avoid making the records usual in transactions of the kind*, and any conduct, the likely effect of which would be to mislead or to conceal.

In this case there are several items of evidence apart from the default in filing the return and paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and *kept inadequate and misleading records*. * * * If on proper submission the jury found these acts, taken together with willful failure to file a return and willful failure to pay the tax, to constitute a willful attempt to defeat and evade tax, we would consider conviction of a felony sustainable. (Emphasis supplied.)

The Court of Appeals for the Eighth Circuit has taken a similar view in tax evasion cases. In *Myres v. United States*, 174 F. 2d 329, 337, it held that willful failure to produce records was evidence of a willful attempt to evade taxes.

Nor are farmers "exempt" from keeping records as appellant contends. (Br. 93.) In *Hendricks v. Commissioner*, decided August 10, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,190), the court said:

Petitioner relies heavily upon section 29.54-1 of Regulations 111. That regulation obviously

merely releases the farmer from the obligation of maintaining customary account books, including inventories, etc., such as would be maintained by a taxpayer engaged in manufacturing or trade. However, the regulations pertaining to income of farmers obviously requires that reasonably accurate accounts shall be kept. Section 29.22(a)-7 provides that the farmer in making his reports shall include the amount in cash or value of all sales of livestock and produce, the profits therefrom, and the gross income from all other sources. It specifies that the profits shall be determined by deducting the cost price from the sale price, less depreciation under certain circumstances. Section 29.41-1 provides that if the farmer's method of "accounting" clearly reflects his income, it is to be followed but that if that method of accounting does not reflect the income, the Commissioner shall prescribe the method of accounting to be used. The regulations do not relieve the farmer, when his income tax return is examined and adjustments recommended, from furnishing sufficient data to enable the Commissioner and the Tax Court to determine the taxpayer's taxable income with reasonably certainty.

If the farmers were exempt from keeping records it would be tantamount to saying that they did not have to pay income tax on their correct income. Furthermore, appellant's income did not arise solely from farming. Clearly he was obliged to keep some sort of record which reflected his income with reasonable certainty. The trial court's instruction was most appropriate under the facts of this case.

Appellant complains (Br. 94-103) of instructions that everyone is held to know the law and one cannot escape the responsibility of good faith. He cites *Morissette v. United States*, 342 U. S. 246; *Direct Sales Co. v. United States*, 319 U. S. 703; *Hargrove v. United States*, 67 F. 2d 820 (C.A. 5th); *Bloch v. United States*, 221 F. 2d 786 (C.A. 9th); *Wardlaw v. United States*, 203 F. 2d 884 (C.A. 5th); *Hartman v. United States*, 215 F. 2d 386 (C.A. 8th); *Berkovitz v. United States*, 213 F. 2d 468 (C.A. 5th); *Bentall v. United States*, 262 Fed. 744 (C.A. 8th); and *Lurding v. United States*, 179 F. 2d 419 (C.A. 6th). These cases may be distinguished.

The trial courts in *Morissette, supra*, *Hargrove, supra*, *Wardlaw, supra*, and *Bentall, supra*, virtually took the issue of intent or willfulness completely away from the jury. Evidence of carelessness in *Bloch, supra*, and lack of ordinary diligence in *Hartman, supra*, were said by the trial judges to constitute willfulness, each gross understatement. In *Lurding, supra*, the trial judge stated that it was immaterial whether the tax return was made out by someone other than the taxpayer. In *Berkovitz, supra*, 213 F. 2d, 474, the instruction on presumptive intent was held reversible error for want of the trial judge's "telling it [the jury] that the evidence offered by the accused to show good faith had to be taken into consideration." In *Direct Sales, supra*, the judgment of conviction was affirmed; thus, the holding of the court lends no support to appellant's argument.

In the case at bar a reading of the instructions as a whole will show that the trial judge put (R. 860)

“the issue as to intent” to the jury in such terms that it must have been clear that the issue was one of fact, not of law, and that they should consider (R. 860-861) “all facts and circumstances in evidence which may aid the determination of the state of mind.” Directly contrary to what was done by the trial courts in *Bloch, supra*, and *Hartman, supra*, the trial court in the case at bar instructed the jury (R. 862-863):

* * * negligence, carelessness or mistake of a taxpayer in the handling of his accounts or in providing information to be used in preparing an income tax return, or in handling business affairs, is not in itself equivalent to the concealment of income or fraud with intent to evade tax.

Instead of making the fatal deletion as in *Lurding, supra*, or the fatal omission as in *Berkovitz, supra*, the trial judge in the case at bar gave an instruction that before they could bring in a verdict of guilty they must find that the errors made were not merely the result of mistakes of fact or law but were due to the bad faith of Leo Elwert. The trial judge said (R. 862):

Good faith on the part of a defendant is a complete defense to the charges set forth in the indictment. Thus, bona fide mistakes made in preparing or filing or failing to file a tax return are not to be considered by you as false or fraudulent statements or concealment of income within the scope of the charge made in the indictment, because willful tax evasion requires an intentional affirmative act as compared to an accidental, inadvertent and passive one.

The statute under which the defendant is charged requires a specific wrongful intent to

conceal income known to exist as compared to a genuine misunderstanding of what the law requires or the bona fide belief that certain receipts are not taxable.

When so qualified by the remainder of the instructions on willfulness, presumptive intent instructions have been held not to be prejudicially erroneous. *Legatos v. United States*, 222 F. 2d 678, 685-688 (C.A. 9th); *Bateman v. United States*, 212 F. 2d 61, 69-70 (C.A. 9th); *Banks v. United States*, 204 F. 2d 666 (C.A. 8th), remanded, 348 U.S. 905, reaffirmed, 223 F. 2d 884, 889-890 [following *Legatos, supra*, and *Bateman, supra*], petition for certiorari pending; *Imholte v. United States* (C.A. 8th), decided November 1, 1955, (1955 C.C.H. par. 9727) [following *Legatos, supra*, and *Bateman, supra*]. Cf. *McFee v. United States*,²⁵ 206 F. 2d 872 (C.A. 9th), remanded, 348 U.S. 905, reaffirmed, 221 F. 2d 807, certiorari denied, October 10, 1955; *Acers v. United States*, 164 U. S. 388, 390.

²⁵ In *McFee, supra*, the trial court gave the following instruction (R. 419):

The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly or intentionally did not report all his taxable income for the year 1945 and 1946 and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.

No objection to this instruction was made at the trial. It was first raised on appeal by letter dated April 22, 1955, after appellant's Supplemental Brief had been filed. See record. There is no discussion of this matter in the Court's opinion.

In *Imholte v. United States* (C.A. 8th), decided November 1, 1955 (1955 C.C.H., par. 9727), defendant argued that the court had erred by instructing the jury that every person is presumed to intend "the natural consequences of his acts knowingly committed." The Court of Appeals said:

As to (5), *Morissette v. United States*, 342 U.S. 246, *Bloch v. United States*, 221 F. 2d 786, and *Legatos v. United States*, 222 F. 2d 678, are cited in support of the criticism of that part of the charge which told the jury that every person is presumed to intend the natural consequences of his act knowingly committed. The *Bloch* and *Legatos* cases both involved charges of willful attempt to evade taxes under § 145(b). The *Bloch* case condemned an instruction as reversible error which told the jury that "the presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly and intentionally did not set up his income, and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax." To the same effect is *Wardlaw v. United States*, 203 F. 2d 884. In the *Legatos* case the court recognized the vice of such an instruction but found that it was so qualified as not to be prejudicial. The *Morissette* case was a larceny case in which larcenous intent had erroneously not been treated as a necessary element of the offense. These cases establish the proposition that where intent is a necessary element of the offense, is not inherent in the act itself, but is a specific intent involving bad purpose and evil motive, that that specific intent must be proved by or clearly inferred from

the evidence, *Wardlaw v. United States, supra*, and the proof of such intent as an ingredient of the offense may not be eliminated by a presumption. *Morissette v. United States, supra*.

There may be a distinction between a case like this, where the question is whether the defendant intended to aid and abet another in the latter's intent and attempt to violate the law, and cases like those above referred to wherein the intent involved is that of the transgressor himself, which intent is a necessary ingredient of the latter's offense. But we draw no such distinction. The instruction had better not have been given. We are convinced, however, that as given in this case it was so qualified that, as in the *Legatos* case, and in *Banks v. United States*, 223 F. 2d 884, 889, the charge considered as a whole correctly stated the law with sufficient clarity as not to be misleading. See also *Bateman v. United States*, 212 F. 2d 61.

Appellant contends (Br. 108-109, 111-117) that the trial court erred in failing to give his requested instructions regarding carelessness, negligence, mistake, inadvertence, oversight, lack of knowledge, lack of concealment, ignorance, and failure to use diligence. From the instructions previously quoted (*Supra*, p. 58) it is apparent that these matters were substantially covered in the charge.²⁶

²⁶ The charge on willfulness included the following instructions (R. 860-863) :

As you have noted, undoubtedly, the acts charged in the indictment are alleged to have been done willfully and knowingly. An act is done willfully if done voluntarily and purposely and with a specific intent to do that which the law forbids. Willfulness implies bad faith and an evil motive. An act is done

knowingly if done voluntarily or purposely, and not because of mistake, inadvertence or some other innocent reason.

With respect to intent, it may be proved by circumstantial evidence. It rarely can be established by any other means, because we know that while witnesses may see and hear and thus be able to give direct evidence of what a defendant does, or fails to do, there can be no eye-witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

In determining the issue as to intent the jury is entitled to consider any act or acts done or omitted by the accused, and all facts and circumstances in evidence which may aid the determination of the state of mind. You are entitled to consider the motive, if any, of the defendant in connection with the various transactions involved as bearing upon the existence or non-existence of the required specific intent.

Evidence has been introduced tending to establish that the defendant was in the years in question involved in various difficulties, including litigation in an action for alienation of affections, marital difficulties with his wife Mary, divorce proceedings, and the like, and that by reason thereof the defendant transacted some of his business and maintained bank accounts in other names than his own to prevent the same from being seized in said litigation or by his wife Mary.

You are instructed that if you find from the evidence that the defendant was involved in such difficulties and carried on the said business transactions and bank accounts in names other than his own for the said purpose and reason, and that he did not resort to such practices for the purpose of concealing from the Government his true income and tax liability, such practices would not constitute concealment of his income or attempted evasion of his tax liability.

On the other hand, you may find the defendant had an intent to evade and defeat the payment of the tax, even though there was coupled with that intent the desire to suppress information for reasons not associated with the evasion of his taxes. Although you may find that the attempted concealment of the receipt of taxable income by the defendant was motivated in part by defendant's desire to hide such information from his wife or other persons than the Government, you may find in addition that the attempted concealment was also motivated by a desire to hide such income from the United

CONCLUSION

It is respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

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E. E. LUCKEY,
United States Attorney.

December, 1955.

States in order to defraud the United States of moneys due as income taxes and with intent to defeat and evade such taxes. Of course, what you may find from the evidence is exclusively a matter for you, the jury, to determine.

Good faith on the part of a defendant is a complete defense to the charges set forth in the indictment. Thus, bona fide mistakes made in preparing or filing or failing to file a tax return are not to be considered by you as false or fraudulent statements or concealment of income within the scope of the charge made in the indictment, because willful tax evasion requires an intentional affirmative act as compared to an accidental, inadvertent and passive one.

The statute under which the defendant is charged requires a specific wrongful intent to conceal income known to exist as compared to a genuine misunderstanding of what the law requires or the bona fide belief that certain receipts are not taxable. Therefore, negligence, carelessness or mistake of a taxpayer in the handling of his accounts or in providing information to be used in preparing an income tax return, or in handling business affairs, is not in itself equivalent to the concealment of income or fraud with intent to evade tax. (Emphasis supplied.)



UNT	EXHIBIT NUMBERS	RECORD REFERENCES
wert	12, 14, 15	97 99, 105, 408, 645
wert	11, 14, 15	94, 96, 106, 408, 640
Schmidt	27, 36, 40	166-169, 185- 186, 201, 204, 671-672
wert	8, 14, 15	66, 85, 105, 407-408, 635
	---	195-197, 674
Schmidt	16, 40	113-115, 161, 201-202, 408, 646
wert	17	117-119, 161- 162, 408, 672- 673
Schmidt	18	120-122, 162, 163, 670
wert	23, 40	129, 133, 138, 203, 409, 673
Leo Elwert	24, 40	129, 133, 139, 140, 202-203, 674
Payment for Legal Services	20, 25	129, 130, 131, 132, 133, 142, 143, 147, 409
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United States
COURT OF APPEALS
for the Ninth Circuit

LEO ELWERT,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for
the District of Oregon.

Honorable William J. Lindberg, Judge.

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FILED

DEC 27 1955



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PRELIMINARY STATEMENT

A

The tabulation on page 15 of Appellee's Brief,
titled "Income Tax", is inaccurate.

The additional tax liability for 1947, as com-
puted by the Government's expert, is not \$6835.15.
It is \$5229.76. Mytinger testified (Tr. 703),

"A. I have recomputed the tax liability in
the amount of \$17,505.78.

Q. What is the amount shown on the exhibit? (return).

A. \$10,670.63."

The difference between the two, is \$5229.76.

The additional tax liability for 1948, computed by the Government's expert, is not \$9787.04. It is **\$623.81**. The expert testified (Tr. 709-710), that the joint tax liability for the year 1948, as computed by him, was \$6831.38, and that the joint tax liability shown on the return was \$5583.76 (Tr. 709-710). The increase in **joint** tax liability, as computed by the expert, is \$1247.62. **One-half** of that **amount**, to-wit, **\$623.81**, would be appellant's **additional** tax liability for 1948 according to the Government's expert (Tr. 709-710).

The tax liability of \$657.08 for 1949, shown in the tabulation, as computed by the Government's expert, is the **total** tax liability, **not additional** liability.

The tabulation, according to the expert's computation should be as follows:

1947	\$5,229.76	Additional
1948	623.81	Additional
1949	657.08	Total for the year.

B

Table IV, P. 70, Appendix to Appellee's Brief is not additional unreported income. The capital gains from the transactions shown in that Table are already reflected in the prior tables. Only the capital gains from said transactions are material

I.
RE SUFFICIENCY OF INDICTMENT
A

Re All Counts

Appellee's brief evades the issue tendered by appellant in connection with the sufficiency of all three counts of the indictment.

The specific deficiency common to all three counts urged by appellant, is the **failure to allege in the indictment the existence of a specific intent** on the part of the defendant to evade the tax.

Appellant's contention is that since it is now settled beyond question that specific intent to evade is an essential element of the offense (**Bloch v. United States, 221 F. 2d 786, 9th Cir.**), the existence of that specific intent must be alleged in the indictment. It is not alleged in any of the counts in this case.

Appellant argues it is not necessary to allege the "means" by which the evasion was to be accomplished. Appellant does not so contend. The allegation of "specific intent" is not the same as an allegation of the "means".

The question of the necessity of an allegation of "intent" was not raised by the defendant or passed upon by the Court in any of the cases cited by appellee. Not a single case it cited in which it has been held that the allegation of intent is unnecessary to a valid indictment for attempted tax evasion.

B**Re Count III**

The sufficiency of Count III was challenged on the additional substantive ground that the failure to file an income tax return and to pay a tax, does not in and of itself constitute a violation of Section 145(b). (**Spies case** and cases cited, pages 9 to 12, Appellant's former brief).

Count III was sustained in the Court below because it contained the additional phrase:

“And by concealing and attempting to conceal
... his true and correct gross and net income
...”

No facts are alleged from which it can be determined whether the concealment was accomplished by “**affirmative acts**” or by silence.

Appellant contended, in the Court below, and contends here, that the bare allegation that defendant “concealed” or “attempted to conceal” without statement of the facts, is a “**conclusion**” merely and insufficient to charge the commission of an “**affirmative**” act of the character described in the **Spies case** as essential to the validity of a charge of evasion.

Appellee's brief evades this contention. Not a single case is cited in which it was held that the bare allegation of concealment without the allegation of any facts, was held to be sufficient to

charge evasion by concealment and no case is cited in which it was held that a bare allegation of concealment constitutes the allegation of an **“affirmative”** act which would be equivalent to a charge of attempted evasion within the purview of the **Spies case**.

The case of **United States v. Smith, 206 F. 2d 905**, cited by appellee at this point, is irrelevant. The Court merely passed upon the **sufficiency of the evidence**. The question sufficiency of the indictment was not raised, discussed or passed upon by the Court.

In the case of **Sens v. United States, 212 F. 2d 795**, cited by appellee, the brief per curiam opinion recites:

“And it appearing that the indictment in addition to willful failure to file a return charged that appellant during the taxable year performed **various acts which constituted evidence of an affirmative**, willful attempt to evade or defeat the payment of the tax . . .”

The indictment in that case **did allege the commission of “affirmative” acts** constituting evasion. The indictment in that case did not charge the mere **conclusion** that the defendant “concealed” or “attempted to conceal” his income. The allegation of concealment without more in the case at bar, is a bare conclusion (**United States v. Fuselier, 46 F. 2d 568**), and is, therefore, **“insufficient in law to compel defendants to meet them as a criminal charge.”**

In **United States v. Kafes**, 214 F. 2d 887, cited by appllee, the indictment charged, **in one count**, violation of Section 145(a) (failure to file a return), and in **separate count**, a violation of 145(b) (evasion). The indictment **did not charge in one count tax evasion** by failure to file a return as in the case at bar.

The sufficiency of the indictment was not challenged in that case and the Court did not discuss or pass upon the sufficiency of the allegations to charge an offense under either of the statutes.

The Court in that case pointed out that attempted evasion can be charged by showing a failure to file a return **"plus other affirmative acts."** (Citing the **Spies case**.)

Count III of the indictment in the case at bar does not charge the commission of any "affirmative" acts in addition to the failure to file a return. The allegation of concealment without facts is not an allegation of the commission of an **affirmative act**.

II.

Re Insufficiency of the Evidence to Support the Judgment.

The case is argued on behalf of the Government as though all of the exculpatory evidence and the evidence of allowable deductions and the over-statement of income in 1949 unsigned return, is non-existent notwithstanding that it is a part of the Government's case.

No attempt is made to demonstrate that there is any evidence that appellant **knew** that his individual returns for 1947 and 1948 were inaccurate or false. No evidence is referred to from which such **scienter** can be inferred beyond a reasonable doubt. There is no evidence in the record that defendant signed these two individual returns and appellee does not point to any evidence of the circumstances surrounding the delivery of these two returns to the appellant for signature. Appellee does not point to evidence as to what transpired when Cook delivered the 1947 return to defendant and Hammond delivered the 1948 return to the defendant for signature. Appellee does not point to any evidence of any conversations pertaining to the figures shown on the return or that defendant made any inquiry as to what they represented, what was included or what was omitted, or the basis on which the returns were prepared. There is not the slightest intimation in the evidence that defendant knew what records were examined by the accountants in the preparation of the returns. In short, there is not the slightest bit of evidence from which knowledge of any inaccuracy in the returns could be imputed to the defendant. Defendant was not only unaware that items of income were not included, **but what is more important, he was unaware that many thousands of dollars of allowable deductions were not taken and he was unaware that in the 1949 return, which was not signed or filed, the accountant had over-stated the income**

for that year by nineteen to twenty thousands dollars.

The Supreme Court has said, "without knowledge, there can be no intent, and without intent, there can be no offense," under the statute on which the indictment is predicated.

There was no issue of fact with respect to the exculpatory evidence and the evidence of allowable deductions. It all came from the Government's witnesses.

RE COUNT III

A

Failure to File 1949 Return

Appellant contends that the failure to file the 1949 return was due to the fact that the accountant had failed to submit the return to defendant for signature and filing and that defendant was unaware that the return had not been filed. We made this contention because the Government's testimony establishes that the **original** returns (partnership and individual), prepared by Hammond, were found in Hammond's possession. Revenue Agent Menlow obtained the returns from Hammond. The Government's case establishes that Hammond did not deliver the returns to defendant for signature and filing. **Revenue Agent Menlow testified** with respect to the 1949 returns that Exhibit 44 was a photostatic copy of the **original** individual return. He testified (Tr. 577):

"Q. Did you see the originals from which these photostats were taken?

A. Yes, sir.

Q. And where did you obtain the originals from which those photostats were taken?

A. **They were in the boxes or records we received from Mr. Hammond.**

Q. Were those among the records that were turned over to you in either February, 1951, or at the end of the year, when you picked up the second batch of records?

A. They were in the boxes."

Government's witness Hammond testified (Tr. 227-228) that the photostatic copies of the 1949 returns were copies of the returns which he prepared.

"MR. MEAD: These returns were furnished by you to the Government for the purpose of taking these photostatic copies; is that correct?

A. Yes."

Appellee attempts to explain Hammond's possession of the returns by **speculating** that they **might** have been returned to Hammond.

The Government had the opportunity to obtain an explanation from Hammond as to how he came into possession of the returns. No such explanation was called for or given. He did not testify that he later obtained the returns from appellant.

We submit that the positive affirmative evidence of Hammond's possession of the returns and the effect thereof upon the question whether he gave the returns to Mr. and Mrs. Elwert, cannot

be dissipated by indulging in speculation that the returns **might** have been returned to Hammond.

If the returns had been left with Mr. and Mrs. Elwert for signature and were later returned to Hammond unsigned, he certainly would have been greatly concerned about the matter. He would have made inquiry as to why they had not been signed and filed and would have arranged for the signing and filing at the time of discovery. There is no such evidence in the record.

In any event, the admitted over-statement of income in the unsigned 1949 return, which was used as the starting point for the computation of the alleged tax deficiency, wipes out entirely any taxable net income. It establishes a loss for the year and creates a substantial loss carry back to 1947 and 1948 as already demonstrated, to say nothing of the additional allowable deductions appellant failed to take.

B

Re Deductions

Appellee does not meet the issue relating to the allowable deductions.

Appellant does not contend that the burden is on the Government to prove the non-existence (a negative) of allowable deductions. We contend that the Government's case affirmatively established the existence of the allowable deductions as a mat-

ter of law and there was no issue of fact in that respect.

The existence of allowable deductions, is material for two purposes:

- (a) To establish that there was no tax liability if the allowable deductions not taken in the returns exceed the established unreported income;

and

- (b) The extent of allowable deductions not taken in the returns, negatives as a matter of law the intent to evade the tax under the facts established by the Government's case.

In the case at bar, the Government's case established affirmatively:

- (a) The existence of the deductions;
- (b) The amount thereof;
- (c) The relation to the alleged unreported income; and
- (d) The effect on the tax liability for each year.

At the close of the Government's case and at the close of the entire case, it was not a question whether there "might" be allowable deductions. The Government's witnesses established the existence of the deductions and all related factors. The issue did not depend upon determination of contradiction between evidence of the Government and the evidence introduced by defendant. The only evidence introduced by defendant merely corroborated the testimony of the Government's witness.

Hammond testified that a comparison of the 1949 unsigned return and the very same records

from which he made the return, shows an overstatement of income of between \$19,000.00 and \$20,000.00 (Tr. 301-302). He was unaware of this over-statement. Revenue Agent Menlow called it to his attention when Menlow was investigating defendant's return on June 6, 1952, at which time Menlow took Hammond's deposition (Tr. 325-326-327). He testified (Tr. 327):

"Q. Was that the first time, then, that you knew there was any error in the '49 return with regard to an overstatement of receipts or an overstatement of expenses?

A. As I recall, yes, it was."

Asbahr, the Government's witness testified that in 1948 defendant sustained a loss of \$22,000.00 on the loan to the Denton Construction Co. (Tr. 495 to 498). Appellee's Brief attempts to create some doubt about this matter by asking why the three notes, testified to by Asbahr, were not produced. This is a very unfair observation. The Government served on Asbahr a subpoena duces tecum. The Court file shows that subpoena. When Asbahr testified, he had before him his file of documents pertaining to appellant's transactions. In fact, he gave most of his testimony from the file and it is a fair inference that if Government's Counsel, who tried the case, entertained any doubt as to the truthfulness of Mr. Asbahr's testimony, he would have called upon him to produce all the documents pertaining to the transaction.

All of the other deductions enumerated in Appellant's former Brief, were established by the

Government's case with equal certainty by the Government's witnesses.

This evidence destroyed the Government's case for it established:

- (a) That there was no tax liability in any of the three years in question; and
- (b) That there was a failure to take allowable deductions to such an enormous extent as to preclude any possibility that there could have been any intention to evade the tax at the time that the 1947 and 1948 returns were signed and filed, or that the failure to file the return for 1949 was due to such an intent.

The cases cited by appellee with respect to the question of deductions are not at all relevant.

In **United States v. Stayback**, 212 F. 2d 313, cited by appellee, the Court merely held that the Government was not compelled to establish the existence of allowable deductions beyond those shown in the defendant's return "and others that it can calculate without his assistance."

The Government's case establishes the existence of allowable deductions in excess of the amount of deficiencies computed by the Government's expert, that the deductions were so extensive, as to dissipate as a matter of law an inference or suspicion of an "intent" to evade the tax. These established facts made it compulsory to grant the motions for a judgment of acquittal as to all three counts.

The case of **United States v. Bender**, 218 F. 2d 869, cited by appellee, is irrelevant for the same

reason. The case did not involve the effect to be given to exculpatory evidence appearing as a part and parcel of the Government's case or the effect to be given to the evidence of allowable deductions established as a part of the Government's case.

The case of **Clark v. United States, 211 F. 2d 100**, cited by Appellee, is not at all in point. In that case, the question of the existence of allowable deductions became a question of fact because the testimony of the Government's witnesses and the testimony of the defendant's witnesses was contradictory with respect to the existence and amount of allowable deductions. There was also dispute as to whether some of the deductions claimed by defendant were, or were not, included in the deductions which he did take in the return under the heading of "Costs of operation or business expenses." It was not a case in which the existence of allowable deductions was established by and through the Government's own witnesses, some of it on direct examination and some on cross-examination.

In the case at bar, the testimony of the Government's witnesses did not merely establish that deductions "may" exist. The evidence established that they **did** exist.

The Court in that case concluded with the significant statement as follows:

"Also, there was here no such establishment of omitted proper deductions, through cross-ex-

amination of the Government's witnesses or on the evidence of appellant, as **legally destroyed the Government's prima facie case of existence of unreported taxable income and of willfulness in connection therewith.**"

The Court recognized that the existence of allowable deductions not taken in the return, can be established as a **matter of law** by the examination of the Government's witnesses and when that is done, the prima facie case, if any existed, is dissipated.

The witness Asbahr testified that the reason for defendant's handling of some of his business transactions through Mr. Asbahr's office was due to:

- (a) The threats and the litigation involving the claim for alienation of affections; and
- (b) The trouble that he had with his wife which resulted in the appropriation of the bank accounts by his wife and his inability to carry on business through bank accounts in the normal manner.

He testified (Tr. 485):

"A. At the time I believe the purpose was for me to hold this money temporarily, and later he was going to have it applied on account of some other transaction that he was interested in. Incidentally, he had domestic troubles at that time, and he was complaining that his wife had most of the funds and he was unable to do business the way he wanted to on account of not having access to the former funds."

.

.

(Tr. 492)

"A. Well, he was complaining at that time that, due to domestic trouble, his wife Mary had control of most of the funds, and he had great difficulty doing business, and he was attempting to hold some money of his own, but he was afraid he might have it attached, or something of that type. He told me that he had been up to the Savings & Loan Association and they had told him that he could use an assumed name, and he asked me whether that was legal or not, and I told him Yes, if it was agreeable to the Savings & Loan people it was legal, providing, of course, he was not deceiving anybody.

Q. Did he then act upon your advice and the advice that had been given him by Mr. Maynard and make that transfer?

A. I presume he did. I didn't follow it up.

Q. You don't know what he did?

A. I don't know. I didn't follow it up.

Q. But you recall definitely that he discussed it, do you?

A. Yes, he counseled with me about it."

Government's witness Schmidt testified (Tr. 182):

"A. Well, it seemed like at that time he was having some difficulties with his wife, and that his bank account had been attached, or she had taken it out, or something. I don't recall just what the circumstances were.

.

A. He was putting money in that name so he would—his own money. In other words, that money that he put in that name he could get in touch with.

.

(Tr. 183)

A. Well, I don't know just how it happened

there, but apparently he didn't have any more access to any bank accounts that he had before."

With respect to the cashing of checks, he testified (Tr. 188):

"Q. And I think you further made the statement that you cashed the checks because he was in need of getting funds to take care of Winos and labor. Will you explain what you mean by Winos, Mr. Schmidt?

A. Well, I suppose it was a bunch he picked up down in skid row. He sent in a truck or two trucks a day for help, and the way I understand he had to pay them in cash, so he required money every day to take care of that itinerant help.

Q. Was this particularly during the harvest season and the planting season of the year?

A. Yes."

The Government's witness Cook testified that the bank account in the Tigard Branch of The United States National Bank was in the name of appellant and his wife until the threats and the alienation action was brought in November 1946 (Tr. 34-35). The transfer of the account to Mary Elwert's name alone was made by reason of the threat of the lawsuit (Tr. 35).

This evidence must be given effect in appraising the Government's evidence to determine whether it made out a prima facie case.

The case of **Canton v. United States**, 226 F. 2d 313, cited by appellee, is not in point. In that case, the question whether the defendant was entitled to

take certain deductions which were not taken in the return, presented a sharp issue of fact. The defendant claimed deductions totaling \$11,259.07. Included in that sum was a total of \$7,978.55 for expense incurred as living expense while defendant, who was a resident of Minnesota, was staying at Drain, Oregon, looking after the business of an independent corporation in which he had a stock interest. The question arose whether the expense incurred was his own individual expense or expense chargeable to the corporation. If the latter, it was not allowable as a deduction. There was divergent testimony on that issue and the Court held that it was proper to submit that issue of fact to the jury for determination.

In the case at bar, the testimony does not present any issue of fact as to the deductions and the explanations for the apparently irregular transactions or the overstatement of income in the returns used as a basis for computation. All of the evidence came from Government's witnesses in the Government's case.

C

Re Bank Accounts In Assumed Names

There were no bank accounts in assumed names until **January 27, 1949**. The opening of the accounts in assumed names in 1949 could not, of course, have any bearing on the tax years **1947 and 1948** (Counts I and II).

The Government's case establishes the reason for the opening of accounts under assumed names in 1949.

The first account that appellant had at the Pacific First Federal Savings & Loan Association, was opened July 2, 1946, Account No. 78660. **This account was opened and carried in defendant's own name** (Tr. 476). The account was closed on **January 27, 1949**, and the entire balance was transferred to a new account at the same bank under the name of "Schamburg", account No. 94299 (Tr. 477). The reason for this change will be presently shown.

The second account was opened **February 25, 1949**, under the name of "Albee", No. 94380.

The third account was opened **June 22, 1949**, under the name of "Albee or Bloomquist", Account No. 94635.

The Government's witnesses Maynard and Asbahr testified to the **reason** for the transfer of the account from appellant's own name to that of a fictitious name and subsequent opening of the other two accounts in assumed names. Maynard testified (Tr. 478) that Elwert "closed the account that was in his name and with that deposit opened this Schamburg account." Elwert discussed with Maynard the matter of closing his personal account. He told Maynard he was going to withdraw the account and that he was concerned about the possibility of someone identifying his account. **Maynard made the suggestion that if he wanted to have an**

account in an assumed name, that was possible (Tr. 479-480). Maynard suggested to Elwert that he could re-deposit the monies in another name (Tr. 480), and a few days after that conversation, after consulting his attorney, Elwert came back and established the Schamburg account (Tr. 480).

Government's witness Asbahr testified that he was an attorney; that he had practiced law since 1917 and he became acquainted with Elwert in the 1940's (Tr. 489); that Elwert had delivered money to him to hold temporarily to be applied later on account of some other transactions he was interested in (Tr. 485). He testified that Elwert had domestic troubles at the time. He was complaining about his wife had most of the funds and he was unable to do business the way he wanted to on account of not having access to the former funds (Tr. 485). Some of the money was applied to the purchase of a home for Elwert's own use (Tr. 490). He testified that Elwert

“had a good deal of domestic trouble and had left his home, I think, before this time.” (Tr. 490).

The charge of attempted evasion is in part predicated on the failure of the returns to reflect the capital gains from the sale of the timber land to Dant & Russell in 1948. The contention is made by the Government that appellant did not inform the accountant Hammond about the transaction and Hammond did not reflect the transaction in the return because he had no knowledge of it.

The marital trouble involved him in litigation. A divorce action was filed in the State of Idaho. The action was filed "very near the first of the year 1949" (Tr. 491). Someone in Asbahr's office served the paper on Mary Elwert and made a return to the Idaho Court (Tr. 492).

Asbahr then testified that Elwert consulted with him about his account at the Pacific First Federal Savings & Loan Association, and testified:

"He was complaining at that time that, due to domestic trouble, his wife Mary had control of most of the funds, and he had great difficulty doing business, and he was attempting to hold some money of his own, but he was afraid he might have it attached, or something of that type. He told me that he had been up to the Savings & Loan Association and they had told him that he could use an assumed name, and he asked me whether that was legal or not, and I told him Yes, if it was agreeable to the Savings & Loan people it was legal, providing, of course, he was not deceiving anybody." (Tr. 492).

A few days after that he went back to Maynard and made the change of the account from his own name to that of Schamburg and subsequently opened the two additional accounts under the name of "Albee" and "Albee or Bloomquist."

This evidence, which is part of the Government's case, establishes the reason for the opening of the accounts in the fictitious names in 1949. It was clearly induced by the divorce litigation with his wife and the many difficulties that resulted

from their separation and the appropriation by his wife of the business bank accounts. He was obviously apprehensive about his wife attempting to sequester his own funds and attempted to conceal the bank accounts from her.

There is not a scintilla of evidence in the record that this maneuver on his part to thwart his wife, had any relation whatsoever to any attempted tax evasion or tax avoidance. This testimony in the Government's case utterly destroys any suspicion or inference that could be drawn from the bare fact that accounts were opened in assumed names. This is not a case where the fact of opening fictitious accounts stands alone and unexplained.

D

Re Bank Account in the Northeast Branch of The First National Bank.

Appellee indulges in the speculation that there is tax significance in the fact that the bank account in the Northeast Branch of The First National Bank was opened **January 14, 1947** (Tr. 104) and that checks were deposited or cashed through that bank account between **February 14, 1947, and May 5, 1947** (Appellee's Br., Table I, p. 65), or as appellee says, this took place during the "ides of March" or at "tax time."

There is not the slightest foundation for this speculation. The time element could have no tax significance because "tax time" (March 15, 1947),

did not relate to the income tax for 1947. It was tax time for the tax year **1946** and, therefore, could not have the significance claimed by appellee.

The Government's case establishes affirmatively that the opening of that account and the cashing of the checks through that account in that period of time was **coincident with and during the time of the trouble with Bloomquist which originated by the demand for \$30,000.00 damages** (Tr. 211) in September 1946, the threat of litigation, and the commencement of the action for alienation of affections by Bloomquist against appellant. The Government's witness Asbahr testified that the lawsuit was commenced shortly after the threat (Tr. 211), (Handley, Tr. 155), (Bernstein, Tr. 210). The litigation was settled in **May 1947** (Bernstein, Tr. 211).

During that period of time, defendant could not sign any checks on the bank account of the Tualatin Valley Nursery (Bernstein, Tr. 21). The checks, which paid the attorneys' fees, were signed by Mary Elwert (Tr. 208). During that troublesome period, appellant's wife Mary withdrew from the business account of the firm in the Tigard Branch of The United States National Bank, the sum of \$27,668.00 and with that amount opened an account in her own name at the same bank. This was on November 9, 1946 (Tr. 41). That account thereafter became the business account (Tr. 420).

Defendant's wife wrote a letter to the bank that it was not to pay any checks drawn by defendant (Tr. 456). Schmidt testified that the checks were cashed by defendant to meet his needs by reason of those troubles (Tr. 190).

These facts are established by the testimony of the Government's witnesses as part of the Government's case and utterly destroy the speculation indulged in by appellee's counsel.

The exculpatory evidence of the Government's witnesses establishes affirmatively the true connection between defendant's difficulties and the establishment and use of that bank account and the cashing of the checks through that bank account and through Schmidt. It was an expedient solely for the purpose of overcoming the difficulties resulting from the Bloomquist litigation and the seizure of the Firm's funds by his wife.

E

Re Capital Gains from Sale of Timber Land to Dant & Russell in 1948.

The transaction resulting in the 1948 capital gain was not concealed and could not be concealed. It was reflected in a written contract with a large corporation. The payments made under that contract were by check and the checks went through bank accounts. **The first payment under the contract totaling \$27,592.98, and the \$550.00 interest payment were deposited in the Tigard Branch of the**

United States National Bank in an account standing in the name of Mary and Leo Elwert. This was the same bank in which the Nursery account was maintained (Appx. 70, Appellee's Br.). \$1047.43 interest payment on 99 W Motel Transaction was deposited in that account (Appx. 69, Appellee's Br.).

If Hammond had given consideration to the transactions that went through this account, he would have become aware of the sale of the timberland to Dant & Russell by reason of the deposit of the aforesaid checks. He is chargeable with knowledge of all the facts which inquiry would disclose and the transaction would have been reflected in the tax returns.

Hammond did not give any consideration to this bank account. He testified (Tr. 318):

"MR. LUCKEY: Q. Did you consider the real estate account at the Tigard Branch in arriving at any of your income tax computations ?

A. I don't think that I did."

Elsewhere in his testimony, which has already been referred to, he testified that the only bank accounts he considered were the Nursery account at that Bank and the bank account at the Sherwood Bank.

The Government's evidence establishes that Hammond had knowledge of the account.

Revenue Agent Menlow testified (Tr. 543):

"Q. May I inquire whether or not you were

given by the accountant the **real estate account papers and books?**

A. At the time I obtained the records from Mr. Hammond it is my recollection the real estate account—part of the bank records for the real estate account were in with the records he gave me.”

Hammond testified (Tr. 243-244):

“Q. As a matter of fact, there was also another account there that year, was there not, known as a real estate account in the name of Mary Elwert and Leo Elwert?

A. I don’t recall it as having been in 1948, although it may have been. I do recall that account, however. I don’t remember the year.

Q. So you do recall that there was a real estate account there in their names?

A. I don’t know whether you would call it a real estate account or not. I don’t remember how the bank statement was headed, but **I do remember a real estate transaction that went through that bank account.**

THE COURT: Which bank account are you speaking of?

A. That would be the U. S. National Bank at Tigard, I believe.

MR. MEAD: Q. When you say ‘that bank account,’ you mean the real estate account, do you not?

A. Yes.

.

Q. So the best you can say, Mr. Hammond, is that **you know there was such an account there?**

A. Yes.”

He also testified (Tr. 270):

Q. **This was a bank account that you had knowledge of and these statements were avail-**

able to you, in any event, weren't they, during this period?

A. Yes, possibly.

Q. That is a fact, isn't it, Mr. Hammond?

A. Well, whether they were made available to me—I suppose they were available to me.”

With respect to the availability of records, he testified (Tr. 327):

“Q. . . . I think you stated on redirect examination that when you went out there to the business office of the nursery you helped yourself to whatever you needed. It was all available to you, was it not?

A. Yes, that is right.

Q. All these records that you have described, including records that were available that you did not use, were all there had you wanted to take them?

A. Yes.

Q. These records that Mr. Luckey said were delivered to you, actually you went out there and got them, didn't you?

A. Yes, there was very few records that were delivered to us. They may have been a few.

Q. But your practice was to go there during the entire time at the nursery and pick up what you needed; is that correct?

A. Yes, that is right.”

Any Revenue Agent examining the bank account would have become aware of that transaction and inquiry would have disclosed all pertinent facts relating thereto.

Revenue Agent Kuhn knew of the Real Estate account. He found the bank records among the records he obtained from Hammond (Tr. 543), and

he had no difficulty in obtaining all the facts pertaining to the capital gain transactions.

There is not a scintilla of evidence in the record that appellant did or said anything to conceal from Hammond the existence of the real estate account at the Tigard Branch of The United States National Bank. The records of that account were available to Hammond and as the evidence referred to above indicates, he knew of the accounts. He merely failed or refused to give that account any consideration and it is that failure that resulted in the omission of the transactions referred to from the returns.

This evidence in the Government's case dissipates any possible intent to conceal the transactions resulting in the capital gain.

F

Re Willfulness and Specific Intent to Evade the Tax.

The cases cited do not have the remotest bearing upon the questions involved in this case. Cases are cited in support of the proposition that willfulness can be inferred from concealment of income. But that is true only where there is no explanation for the apparent concealment other than attempted tax evasion.

In the case at bar, the Government's evidence dissipated such inference because the existence of the bank accounts under assumed names in 1949

upon which the contention of concealment is predicated, were fully explained by the Government's own witnesses which showed that the concealment of the accounts was from defendant's wife and from Bloomquist who was asserting a claim for damages against him. The existence of the bank account in the Tigard Branch of The United States National Bank (real estate account) was not concealed. It was known to the accountant and the records pertaining thereto were in his possession. Revenue Agent Menlow obtained these records from Hammond.

In the case of **Maxfield v. United States, 152 F. 2d 593**, cited by appellee, the concealment consisted of the **keeping of "2 sets of books—one for exhibition purposes only"** and "nothing in appellant's books indicated that they owned any property." In that case, it was also established that the taxpayer took deductions of \$134,000.00 when there was no justification therefor.

In the case at bar, there were no two sets of books and the ownership and sale of the property which resulted in the capital gain, was ascertainable from the available records as already demonstrated.

The Government's case failed to establish "willfulness" and the specific intent to evade the tax because:

- (a) Every suspicious circumstance was dissipated by the testimony of the Government's witnesses;

- (b) The evidence establishes that there was in fact no taxable income in any of the three years;
- (c) The evidence establishes that appellant failed to take many thousands of dollars of allowable deductions in all of the three years in question;
- (d) The evidence establishes that appellant was unaware that the accountant Hammond had over-stated the 1949 income by \$19,000.00 to \$20,000.00;
- (e) The Government's evidence establishes that the transactions carried through banks other than the regular business bank accounts, were devices to conceal the accounts and the transactions from (a) Bloomquist and (b) his wife;
- (f) The Government's evidence establishes that the cashing of checks through Schmidt and other bank accounts was due to the fact that appellant was required to have large sums of cash to pay itinerant laborers and to the practice of paying cash for many purchases of supplies for the Nursery.

All of these facts, and many others, established by the Government's witnesses as a part of its case, dissipated entirely, as a matter of law, any suspicions or inferences of intent to evade the tax.

The **Remmer case**, 205 F. 2d 277, cited by appellee, involved a net worth case in which the taxpayer concealed his ownership of property, a safe deposit box and business licenses. These were material to the determination of his net worth at the end of the accounting period. The case did not in-

volve the alleged omission of specific items of income or the existence of allowable deductions. In that case, **the concealment was not explained away by evidence of the reasons therefor which would negative that the concealment was due to intent to evade the tax.**

Appellee argues that appellant "must have known" that the 1947 return was false. The test is not whether he "must have known," or "should have known," but whether he actually did know. Knowledge, which must form the foundation of the specific intent to defraud, **cannot be constructive knowledge. It has to be actual knowledge. (Hargrove case, p. 27 former brief.)**

It is asserted that the 1947 return bears "what purports to be" his signature and that this constitutes prima facie evidence that it was actually signed by him. It is upon this presumption that the inference of knowledge of the falsity of that return is predicated. No authority is cited in support of the assertion that such presumption exists. **In a criminal case, there can be no presumption of any fact essential to the establishment of the offense.**

But if we were permitted to indulge in the presumption claimed by appellee, the presumption only goes to the matter of the signature. Upon this presumption, appellee **imposes the further presumption or inference** that appellant knew the contents of the return and knew that it was false

and upon this second presumption, appellee **imposes a further presumption or inference** that the return was made with the intent to evade the tax. Thus, we have the typical case of the **pyramiding of presumptions upon presumptions or inferences upon inferences**. (U. S. v. Litberg, p. 28 former brief.)

G

Re Variance

The indictment did not charge any falsity in the partnership returns and it did not charge any falsity in the individual returns **insofar as it reported the taxpayer's distributive share of the partnership income**. The indictment and the Bills of Particulars all charged falsity in failing to report **additional individual income**. The evidence established that the items of unreported income relied on by the Government, were not appellant's **individual additional income**. The evidence established that all of the items represented partnership "receipts" (not income). This evidence would only involve the accuracy of the amount of the appellant's distributive share of the partnership income as reported in his return, as to which there was no charge of falsity. That evidence did not establish that appellant had **individual income** in addition to the share of partnership income shown in his return.

Appellee does not cite a single case in which a conviction was sustained against a partner on an

indictment which charged falsity with respect to his individual additional income and the proof consisted of evidence of falsity in partnership receipts. None of the cases cited by appellee under the heading of "Variance" even remotely touch the issue tendered by the appellant.

Appellant was denied the protection afforded him by the **Sixth Amendment to the Constitution of the United States** which requires that he "be informed of the nature and cause of the accusation", and the right to be tried on that accusation in the indictment only, and not on others. When defendant was tried on the issues of partnership income, he was not tried on the offense charged in the accusation. **He was denied due process of law.**

Appellee makes the concession that

'it would have been better form had the Bills of Particulars for the years 1947 and 1949 specified that the items represented unreported income of the partnership and that appellant's unreported income consisted of his distributive share which was one-half thereof.'

But it is argued that the defendant was not injured.

We can conceive of no greater injury to a defendant charged with crime than to be **deprived of the constitutional guarantees designed to protect him.** If it was the intention of the Government to charge defendant with falsity in reporting his share of the partnership net income, then the indictment should have so charged.

III

Re Instructions Given and Refused

Appellee dismisses the issues raised with respect to the instructions given and refused with the generalization that the instructions given, as a whole, are adequate.

Appellee's brief does not question the legal soundness of the requested instructions or their applicability to the facts in the case at bar.

The questions raised cannot, however, be dismissed or glossed over by the generalities indulged in by appellee as will be readily apparent from the following illustrations:

a.

One specific objection is that the Court failed to include, as an "element" of the offenses charged in Counts I and II, (although specifically requested to do so—Tr. of Rec. 19) the requirement that at the time he filed the returns for the years 1947 and 1948 he "had the specific intent to evade the payment of a substantial part of the income taxes."

Although the Court omitted to instruct that the intent to evade was an "element" of the offenses charged under those two counts, the Court emphasized that the specific intent to evade was an element in connection with the offense charged in the **third** count. The Court said:

“The essential elements of the offense charged in Count 3, therefore, **are different**, and I will name them for you.” (Tr. 855.)

The Court then enumerated the elements and as the fifth element (Tr. 856), instructed it was a requirement that:

“The failure to file such income tax return and to pay said tax was with the specific intent to evade the payment of said tax; that is to say, that he intentionally and deliberately refrained from filing the return and paying the tax for the purpose of cheating and defrauding the Government of revenue legally due to the Government.”

Now that element was equally essential to the first and second counts. The effect of the Court's instructions was to confine this element to the third count. It was equivalent to saying that the specific intent was not an element under the first and second counts.

The Court later defined specific intent (Tr. 859), but it did not anywhere in the instructions indicate that the specific intent would be equally an essential element with respect to Counts I and II. In view of the limitation of intent to Count III, the general definition of “intent” could only be applied by the jury in considering the existence of intent as to Count III.

There is further indication that the Court limited the element of intent to Count III in the following instruction given by the Court (Tr. 857):

“You are instructed that **the failure to file an income tax return and to pay the tax (Count III) does not constitute concealment or an attempt to conceal tax liability, even though the taxpayer may legally owe income tax to the Government. To constitute concealment or an attempt to conceal the Government must establish beyond a reasonable doubt that the defendant committed some affirmative act for the purpose of concealing his true net income and tax liability in addition to the failure to file the return, and that it was with the specific intent to evade a tax liability legally due.**” (Matter in parenthesis supplied.)

In view of these limitations, all that the Court said with respect to the consideration of intent and how it to be determined, must have been construed by the jury as applying to Count III only and not to Counts I and II.

b.

Defendant requested an instruction that with respect to the existence of the specific intent to evade, the jury would be entitled to take into consideration the failure of defendant to take large allowable deductions in his income tax returns if they found, as a fact, that he did so. (Request No. 20, quoted p. 113, former brief).

Appellee argues that there was a sufficient instruction on this subject because the Court gave instructions to the effect that the jury would have to find that there was a **tax liability in fact** and that the **liability consisted of the difference between the gross income and the deductions allowed**

by law. (Appellee's Br. 50). This argument misses the point of defendant's contention.

The instruction that the jury would have to find that there was a tax liability in fact, did not dispense with the necessity of an instruction that the failure to take allowable deductions should be considered in determining the existence of specific intent to evade the tax.

The failure to take allowable deductions, is strong evidence of the non-existence of that intent, even though it may not entirely wipe out the tax liability.

The appellant was entitled to have the attention of the jury directed to that important matter.

c.

The portion of the instruction quoted at page 52 of Appellee's Brief, insofar as it deals with the element of intent, was again specifically limited to Count III for it deals with the matter of concealment in connection with the **failure to file a return (Count III) and the necessity of evidence of "affirmative" acts to constitute concealment.** This portion of the instruction cannot by any stretch of the imagination be said to apply to Counts I and II of the indictment.

d.

The United States Supreme Court did not in the **Spies case** decide or even intimate that inadequacy

or inaccuracy of records maintained by the taxpayer would constitute an offense, either under **subdivision (a) or (b) of Section 145**. What the Court held in that case was that willful attempt may be inferred from certain conduct. It gave certain illustrations of such conduct. But it did not include **inaccurate or inadequate records** which resulted from **carelessness or ignorance** of the taxpayer or his accountants or both.

These illustrations are sufficient to demonstrate that the specific issues raised by the exceptions to the instructions given and the refusal to give the requested instructions, cannot be disposed of or glossed over by generalities. They must be considered in relation to the specific subject matter involved in each instruction.

No instructions are to be found which covered the errors committed in the instructions as given or supplied the elements in the requested instructions which the Court did not give.

CONCLUSION

The judgment should be reversed with directions to enter a judgment of acquittal as to each of the counts of the indictment.

Respectfully submitted,

S. J. BISCHOFF,
GEORGE W. MEAD,
Attorneys for Appellant.

United States
COURT OF APPEALS
for the Ninth Circuit

LEO ELWERT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR RE-HEARING AND
BRIEF IN SUPPORT THEREOF

Appeal from the United States District Court for
the District of Oregon.

HONORABLE WILLIAM J. LINDBERG, Judge.

FILED

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United States
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LEO ELWERT,

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Appellee.

PETITION FOR RE-HEARING AND
BRIEF IN SUPPORT THEREOF

Appeal from the United States District Court for
the District of Oregon.

HONORABLE WILLIAM J. LINDBERG, Judge.

To: UNITED STATES COURT OF APPEALS
for the Ninth Circuit, and
the JUDGES thereof:

Comes now Appellant Leo Elwert and presents this,
his petition for a re-hearing for the reasons and on the
grounds set forth in the brief submitted herewith.

BRIEF**I****Re Over-statement of Gross Income in 1949.**

In considering the effect of the over-statement of \$19,000.00 of gross income in the computation of the 1949 tax liability, the Court refused to give effect to this over-statement on the ground that the jury was not bound to believe that there was such an over-statement.

We respectfully submit that the Court overlooked important and conclusive evidence which removed this question from the realm of disputed fact. There was no question of credibility of the witness Hammond in this respect. The facts in this respect are all undisputed and were developed by the evidence introduced by the Government. The Court overlooked entirely the testimony of the Government's Revenue Agent Menlow in this respect. The over-statement of income was discovered by the Revenue Agent Menlow during his investigation of the case. Menlow was unable to reconcile the gross receipts for 1949 with the books and records from which accountant Hammond made up the 1949 return. (Tr. 578.) *The matter was first called to Hammond's attention* by the Revenue Agent (Tr. 325) and not by defendant's accountant Eiseman. On June 6, 1952, Revenue Agent Menlow examined Hammond under oath. Excerpts from that examination appear at pages 325 to 327 of the transcript.

Revenue Agent Menlow said to Hammond:

"The gross receipts is nowhere in line with the bank deposits." (Tr. 326.)

Hammond then testified that that was the first time that he knew that there was an over-statement of income in the 1949 return (Tr. 327).

Hammond testified that he made up the 1949 returns from certain books and records (Exh. 49 A to C) which recorded the gross receipts insofar as they were deposited in bank accounts. It was from these books that he determined the gross income for 1949 at \$175,849.00. He re-examined the *same records* in Court and that re-examination confirmed the over-statement to the extent of \$19,000.00 to \$20,000.00. These were the same records from which he made up the return. He arrived at that figure through "those receipt books that we are talking about." (Tr. 291-292.)

He testified that if he had the same books from which he made the return, he should be able to arrive at the same figure. (Tr. 292.) He was then asked to take those books and examine them. (Tr. 292-293-294; 298; 301.) At that point, after considerable examination, he conceded that the books he had before him were the ones from which he made the 1949 return and he testified that he was unable to reconcile the return with those books.

"Q And the income shown upon the return is in excess of any amount that you have been able to arrive at by reconciling them with those exhibits; is that correct?

A Yes, that is right.

Q You are not able to explain that?

A No, I am not.

* * * *

Q That is possible, too. Do you know approximately, Mr. Hammond, by what amount your gross receipts reported in the 1949 return exceeded the amount that you are able to reconstruct from the books that you have?

A I think in the last time we tried to reconcile it it was approximately *twenty thousand, nineteen or twenty thousand dollars*.

Q *There was nineteen or twenty thousand dollars difference there?*

A Yes." (Tr. 301-302.)

In trying to ascertain from Hammond an explanation for the over-statement of gross income, he testified as follows:

"Q Now, Mr. Hammond, if it were a fact that rather than the item of \$173,319.76 as the total gross receipts from the business the gross receipts were actually \$158,316.75, as is alleged to be the gross receipts by the Government for that year, could it be possible that you took into account income for that year other than income from the Tualatin Valley Nurseries operation?

A It is possible, but I would not know from what source." (Tr. 292.)

Revenue Agent Menlow testified that he made a comparison of the gross receipts shown on the unfiled 1949 return with those reflected in the books and records; (Tr. 525) and

"Q In reference to the gross receipts did you find from the books and records whether they were or were not understated or overstated?

A Yes.

Q Were they under or overstated?

A There was an overstatement but not in an amount greater than the decrease in the expenses." (Tr. 526.)

The computation of the gross income for 1949, as shown in the account book, Exhibit 49-A, B, and C (records from which Hammond made the return), shows that the gross income was \$19,000.00 to \$20,000.00 less than the amount shown on the unfiled return. This did not involve Hammond's veracity. It was a matter of computation. The addition of the columns of figures in the very books from which he made the return, established the fact that there was an over-statement of the gross income.

This record demonstrates that there was *no issue of fact* as to the over-statement of the income in the 1949 return to the extent of \$19,000.00 to \$20,000.00. The over-statement was discovered by Revenue Agent Menlow. He admitted that it was an over-statement.

The documentary evidence—the account books, Exhibit 49 A, B and C—confirms both the Revenue Agent Menlow and the accountant Hammond, that there was an over-statement of gross income. It demonstrates to a mathematical certainty that there was an over-statement in the return to the extent of \$19,000.00 to \$20,000.00. Bearing in mind that this is a record established as a part and parcel of the Government's case, it is impossible to conceive how there could be an issue of fact with respect to the over-statement of the gross income.

The accountant Hammond was the Government's witness and a reading of his testimony as a whole, demonstrates that *he was hostile to the defendant*. It is true that he was still keeping the accounts for the Nursery at the time of the trial, but the Court overlooked the fact that defendant was not in charge of the Nursery or was even operating it at the time. The record establishes that by reason of the marital dissension between Leo Elwert and his wife, that he was excluded from the operation of the Nursery. Hammond was maintaining the records for the Nursery under the direction of Mary Elwert and it cannot be said in any realistic sense that Hammond was Leo Elwert's accountant and favorably disposed to him.

It is true that on re-direct examination, Hammond testified that he was told by Elwert's accountant that the gross receipts in the return could not be reconciled with the books, but this was after the Revenue Agent examined Hammond about the matter. His re-cross-examination demonstrated that he already knew of the over-statement; that the facts in regard to the over-statement were developed in the written deposition that Revenue Agent Menlow took long prior to the indictment and he again conceded that there was an over-statement upon his own examination of the records thereafter and the records in evidence support the conclusion that there was an over-statement.

We respectfully submit that the Court overlooked the evidence referred to in coming to the conclusion that there was an issue of fact for submission to the jury

with respect to the over-statement of the income. This error is important because it not only wipes out the alleged under-statement of income for the year 1949, but wipes out the deficiencies in the 1947 and 1948 returns as well.

The *total income tax liability* for 1949, as computed by the Government's expert, was only \$657.08 and the *additional* tax liability for 1948 was only \$623.81 and for 1947, the additional tax liability was \$5,229.76. These figures were arrived at without giving effect to any of the allowable deductions. Computation based upon the reduction in gross income of \$19,000.00 to \$20,000.00 would have wiped out all of these tax liabilities.

Upon the record as made in this case, it was incumbent on the Court below and upon this Court to hold, as a matter of law, that the gross income in 1949 should be reduced by \$19,000.00 and the tax liabilities for the years re-computed on that basis and when so done, there would, as a matter of law, be no tax liability in any of the years in question.

The Court has overlooked the important fact that the 1949 return, which was used as a basis for the computation, was not signed by defendant or anyone on his behalf and there is not a scintilla of evidence that defendant was aware of its contents.

Hammond testified that he left the return with defendant by the documentary evidence and his own later testimony, and the testimony of the Revenue Agent, established without question that Hammond was mis-

taken. This evidence established that the original returns prepared by Hammond were obtained from Hammond by the Revenue Agent Menlow. He took photographic copies of the returns, being the copies in evidence, and later returned the returns to Hammond.

Revenue Agent Menlow testified: (Tr. 577)

“Q Did you see the originals from which these photostats were taken?

A Yes, sir.

Q And where did you obtain the originals from which those photostats were taken?

A *They were in the boxes or records we received from Mr. Hammond.*

Q Were those among the records that were turned over to you in either February, 1951, or at the end of the year, when you picked up the second batch of records?

A They were in the boxes.”

Hammond testified: (Tr. 227-228)

“MR. MEAD: *These returns were furnished by you to the Government for the purpose of taking these photostatic copies; is that correct?*

A Yes.”

In *United States v. O'Malley*, 131 F. Supp., 409, the Court granted a motion for judgment of acquittal. Emphasis was placed by the Court on the fact that the exculpatory evidence was developed in the Government's case upon cross-examination. The Court said:

“Under such circumstances the evidence all adduced in the Government's case, falls far short of the substantial proof necessary to establish a total lack of cash resources on January 1, 1946.”

If the evidence of over-statement of gross income in the 1949 return had been introduced in the first place

by defendant in the defendant's case, and the evidence depended upon the credibility and veracity of the witnesses, an issue of fact would be presented for consideration by the jury. But in the case at bar, the Government used the unsigned return prepared by the accountant as a starting point and the Government's own witness dissipated the evidentiary value of that return when the Government's witnesses testified that the return over-stated the income. That made the return an improper basis for computation. It created a defect or deficiency in the Government's case with respect to the issue of the existence of taxable income in that year (upon which the Government had the burden of proof) and the existence of a large loss deduction available for carry-back purposes.

II

Re Deductions

The Court erroneously indulges in speculation that the payments in cash for various operating expenses which were not taken as deductions in the returns, might have been paid with cash received from sales.

Neither the indictments, nor the bills of particulars, charge the failure to report any cash receipts from any source whatsoever.

The receipt and disposition of cash from sales was not made an issue in the case and defendant was not tried on any such charge.

This case is based upon an indictment implemented by bills of particulars which charge the failure to report

certain specific items of unreported income, each of which was represented by a check received by defendant, cashed by him and disbursed by him, and not upon unreported cash sales.

There is no evidence that any of the payments for the claimed allowable deductions came from cash received from sales. It is a surmise merely. The Court overlooked the important fact that this case is not predicated on the net worth theory or on the bank account theory.

Moreover, neither the indictment, nor the bills of particulars, charged defendant with the taking of unlawful deductions except the one item of \$637.00 alleged to have been taken in 1947 (Bill of Particulars, Tr. of Rec. 10-11) and no attempt was made to establish that this deduction was unlawful or improper.

Upon these indictments and these bills of particulars, it is pure speculation to surmise that the cash payments made for itinerant laborers and other purposes came from unreported cash received from sales.

As to the year 1947, there is direct evidence by the witness Schmidt that the principal item of unreported income, \$12,750.00, received from Church Grape Juice Co., and the smaller checks, were used, in fact, to pay the itinerant laborers. (See summary of evidence, page 34, Appellant's Opening Brief.) There is not a scintilla of evidence to the contrary or that would raise a doubt as to the truth of this testimony given by the Government's own witness. He gave this testimony on direct examination (Tr. 164-5) and on cross-examination (Tr. 188-9).

Defendant was entitled, as a matter of law, to take deductions for all business expenses regardless of the source of the funds with which the expenditures were paid.

The return for the year 1947, and the Government's experts, failed to give effect to the payment *by checks* drawn on the business account of the Nursery for State income taxes totaling \$6,187.50 which was the State tax liability for both partners. *These were not paid in cash.* There is in evidence, as part of the Government's case, the checks with which payment was made and the testimony of the payments. (Exh. 111, and Tr. 45, 604, 612-614, 703.) There certainly was no issue of fact to be submitted to the jury as to the State tax liability, its payment and that it constituted a proper allowable deduction which had not been taken.

If it was the Government's contention that the payments were made with funds derived from unreported taxable income, then the burden of proof was on the Government to establish that fact. The receipt of taxable income is a part of the Government's case which must be pleaded and established by evidence.

In *United States v. O'Malley*, 131 F. Supp., 409, the Court said:

"The Government had the burden of proving that defendant's explanations were false in order to justify the inference that the alleged loans were in fact taxable income, *United States v. Adonis*, 3 Cir., 221 F. 2d 717."

Here, there was no charge in the indictment, or in the bills of particulars, that the defendant received tax-

able income *in cash*. The bills of particulars specify certain specific items which were received by checks from various sources, but it is not charged that he received in cash any unreported income.

While there is evidence that there were some cash sales made (not many) (Tr. 736), there is not a scintilla of evidence that any of it was used to pay the expenses involved in the claimed deductions established by the evidence.

III

Re Intent

The Court applied a basically erroneous principle covering the disposition of motions for judgment of acquittal. It is settled beyond question that

“To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, *even in a civil case, is not sufficient to establish a conclusion or where they give equal support to inconsistent conclusions.*” (Wesson v. United States, 172 F. 2d, 931; Eighth Cir.) (Emphasis supplied.)

In *United States v. Kelley*, 119 F. Supp., 217, the Court held:

“As in all criminal cases, there must be substantial evidence of facts consistent with guilt and inconsistent with every reasonable hypothesis of innocence of the crime for which convicted. *Hammond v. United States, supra; United States v. McCarthy*, 7 Cir., 1952, 196 F. 2d 616; *Johnson v. United States*, 8 Cir., 1952, 195 F. 2d 673; *Strickland v.*

United States, 5 Cir., 1946, 155 F. 2d, 167; United States v. Laffman, 3 Cir., 1945, 152 F. 2d 393; Scott v. United States, 10 Cir., 1944, 145 F. 2d 405, certiorari denied 323 U.S. 801, 65 S. Ct. 561, 89 L. Ed. 639; United States v. Thatcher, 3 Cir., 1942, 131 F. 2d 1002. 'It is still the law that there can be no conviction of crime on circumstantial evidence unless the only possible inference to be derived from it is that of guilt. There must be evidence which forecloses and makes impossible any other conclusion.' Maryland & Virginia Milk Producers Ass'n v. United States, 1951, 90 U.S. App. D.C. 14, 23, 1953 F. 2d, 907, 917."

We respectfully submit that the Court did not give effect to the principles set forth in these cases.

The Court, in the case at bar, starts with the assumption that evidence of intent "necessarily must be circumstantial." It then summarizes certain circumstances and it comes to the conclusion that the circumstances, designed to establish concealment, merely established "concealment from his wife rather than the Treasury Department". The Court also concluded that the evidence of the failure to take the deductions in the years in question for "large items of business expense" indicates that Elwert was "not tax conscious" and "tends to negate any intention to evade taxes". The Court went on to point out the reason for Elwert's maintenance of the bank accounts in fictitious names and it found that this was induced by the difficulties with his wife and was not brought about by any intent to evade tax liability. The Court then concludes that there exists a reasonable hypothesis of innocence.

We have, therefore, conclusions by the Court of the existence of the basic elements which establish lack of intent.

Nevertheless, the Court sustains the conviction because there were in evidence some circumstances from which a jury could have drawn an inference contrary to that of innocence. This is diametrically opposed to the rule referred to above.

In *Pevely Dairy Co. v. United States*, 178 F. 2d, 363, (Eighth Cir.) the Court said:

"In *Read v. United States*, 8 Cir., 42 F. 2d 636, 638, which was a criminal case, this court, in an opinion by the late Judge Kenyon, said: 'The law applicable to the first proposition (the question of the sufficiency of the evidence) is well settled in this circuit. In *Salinger v. United States*, 8 Cir., 23 F. 2d 48, 52, this court said: 'Unless there is substantial evidence of facts which *exclude every other hypothesis but that of guilt*, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and, *where all the evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the accused.*' " (Emphasis supplied.)

The only circumstances which the Court points to as tending to establish an inference of guilt, is the statement made by the witness Cook that he asked defendant

"What other transactions have you had for the year." (Tr. 48.)

But this statement, general in character and not directed to any specific matter, did not involve merely a failure to report additional gross income. He used the term "transactions" and "transactions" involve not only

receipt of income, but also involves expenditures for business operations which would be allowable deductions. The import of that statement is that Elwert failed to inform him that he had made many disbursements for business expenses which would be allowable deductions, as well as the failure to inform him of additional income. If there had been merely a failure to disclose additional income, perhaps an adverse inference could be drawn. But there was a failure to disclose additional expense as well as income and, therefore, the statement relied on to support an adverse inference lacks probative value as evidence of an intent to evade the tax.

The statement is consistent only with the conclusion that Elwert was careless or thoughtless or lacked recollection, both as to additional items of income and additional items of deductible expense.

In this respect, Elwert is subject to no more criticism than the accountant Cook himself for he, too, failed to recall that checks totaling \$6,187.50 were drawn on the firm's bank account and paid to the Oregon State Tax Commission in 1947 in payment of the 1946 tax which were clearly allowable deductions. Yet, he omitted to take this deduction in making the 1947 return.

The allowable deductions which defendant failed to take in the returns are so extensive in amount and are of such character that it must be said, as a matter of law, that defendant could not have, and did not have, the intent to evade his income tax liability. The failure to take the deductions is consistent only with the con-

clusions that defendant was not "tax conscious" as the Court has already found. The conclusion is inevitable that the defendant merely went about the business of conducting the partnership operations without any thought or regard for tax consequences, either with respect to receipts or disbursements, to such an extent that even when the consequences of his failure to keep a record of his cash expenditures tax-wise was directly called to his attention and impressed upon him by the accountant and was told that it would result in loss to him, he, nevertheless, neglected to keep records of such expenditures. It is inconceivable that a farmer, operating as defendant did, as described by both accountants, could have entertained the intent to evade taxes. The evidence merely established that the defendant was one of a class who cannot reconcile themselves to keeping of records.

Another factor that strongly mitigates against the existence of the criminal intent, is the infinitesimal amount of deficiency in taxes determined by the Government's experts. As already pointed out, in 1949 the *total* tax liability for the year was only \$657.08. In 1948, the tax *deficiency*, as established by the Government's experts, was only in excess of \$623.81. Certainly, in these two years the amounts are infinitesimal in relation to the volume of the business transacted and it taxes credulity to say that defendant entertained the intention to cheat the Government out of these two small amounts under the conditions disclosed by the record.

CONCLUSION

We sincerely believe that the conviction of the defendant upon the record in this case is a grave miscarriage of justice. The decision in this case, in effect, removes the element of specific intent to evade as a basic requirement to warrant conviction. It subjects every taxpayer to the hazard of conviction because of mistakes, ignorance, or negligence, in the conduct of his business affairs. It permits the submission of a case to a jury upon evidence of a very nebulous general statement in the face of the overwhelming evidence in the Government's case which established lack of criminal intent.

We earnestly and sincerely urge upon the Court a reconsideration of the record in the light of these observations and the points presented by our former briefs.

We believe that the questions involved warrant submission of the case to the entire Court sitting *en banc* and that upon a re-consideration, the judgment of conviction should be reversed with directions to enter a judgment of acquittal.

Respectfully submitted,

S. J. BISCHOFF,
GEORGE W. MEAD,
Attorneys for Appellant.



No. 14847

United States
Court of Appeals
for the Ninth Circuit.

GENERAL ACCIDENT, FIRE AND LIFE
ASSURANCE CORP., LIMITED, a
Corporation,

Appellant,

vs.

INDEPENDENT MILITARY AIR TRANS-
PORT ASSOCIATION, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

DEC 27 1955



No. 14847

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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District Court of the United States, Northern
District of California, Southern Division

Civil No. 33441

INDEPENDENT MILITARY AIR TRANSPORT
ASSOCIATION, a Corporation,

Plaintiff,

vs.

GENERAL ACCIDENT, FIRE AND LIFE AS-
SURANCE CORPORATION, LIMITED, a
Corporation,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of
action alleges:

I.

Plaintiff is a corporation organized and existing
under the laws of the State of Delaware with its
principal place of business in the District of Colum-
bia, and defendant is a corporation organized under
the laws of the Kingdom of Great Britain doing
business in the State of California and having an
office in said state in the City and County of San
Francisco. The matter in controversy exceeds, ex-
clusive of interest and costs, the sum of Three
Thousand Dollars (\$3,000.00).

II.

On October 15, 1952, defendant issued to plaintiff
its policy of insurance whereby defendant agreed
with plaintiff, among other things, to indemnify

plaintiff for all loss, to a limit of \$50,000.00, sustained by plaintiff during the term of said policy:

“1. Through any fraudulent or dishonest act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and including that part of any inventory shortage which the Assured shall conclusively prove to have been caused by the fraud or dishonesty of any of the Employees, the amount of insurance on each of such Employees being the Limit of Liability applicable to this Insuring Agreement 1.”

By said policy defendant further agreed:

“If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the Employees and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agreement, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the Limit of Liability applicable to this Insuring Agreement 1.”

III.

Plaintiff has paid to defendant all premiums required by the terms of said policy and has kept and performed all terms and conditions thereof on its part to be kept and performed, and said policy was in full force and effect during all times stated herein and particularly on November 27th and 28th, 1953.

IV.

On or about November 27th or 28th, 1953, plaintiff suffered a loss of Fifteen Thousand Seven Hundred Twenty-eight Dollars and Fifty-seven Cents (\$15,728.57) in United States currency and coin from a cash box in a drawer of a desk of an office occupied and used by plaintiff and its employes at the Oakland Municipal Airport in the City of Oakland, County of Alameda, State of California, being one of the premises specifically covered by said policy. Said loss is alleged to have been caused by the fraud and dishonesty of one or more of plaintiff's employes and plaintiff is unable to designate the specific employe or employes causing such loss. Said loss and the facts and circumstances surrounding the same were investigated by the Police Department of the City of Oakland, and the Police Department thereafter reported in writing to plaintiff that the loss was due to theft committed by one of the employes of plaintiff or by some unknown person under the supervision and control of an employe.

V.

Following said loss and on or about December 1, 1953, plaintiff gave to the defendant written notice thereof and thereafter and on or about December 28, 1953, plaintiff delivered to defendant schedules itemizing said loss and on or about the same time submitted to defendant a true copy of the report of the Oakland Police Department with respect to the cause of said loss. Thereafter, and within the time prescribed by the terms and conditions of said policy of insurance, plaintiff prepared and filed with defendant affirmative, itemized proof of loss duly sworn to, copy of which marked Exhibit B is attached to this complaint and by this reference made a part hereof.

VI.

Defendant wrongfully and without cause has disclaimed responsibility to plaintiff under said policy of insurance and has failed and refused and still fails and refuses to pay said claim.

Wherefore, plaintiff prays judgment against defendant herein for the sum of Fifteen Thousand Seven Hundred Twenty-eight Dollars and Fifty-seven Cents (\$15,728.57) together with interest thereon at the rate of Six Per Cent (6%) per annum until paid, and for such other relief as may be meet and proper in the premises.

/s/ RICHARD ERNST,

/s/ R. L. MILLER,

Attorneys for Plaintiff.

PROOF OF LOSS

General Accident, Fire and Life Assurance
Corporation, Limited,
155 Sansome Street,
San Francisco 4, California.

Re: Your Comprehensive Dishonesty, Disappearance and Destruction Policy-Form B,
No. D.D.D. 5494 Issued to Independent
Military Air Transport Association under
date of October 15, 1952.

By your policy of insurance above described you insured the undersigned Independent Military Air Transport Association, whose principal office is 1025 Connecticut Avenue N.W., Washington, D. C., against loss caused by the fraud or dishonesty of any one or more of the employees of the undersigned to the policy limit of \$50,000. On or about November 27th or 28th, 1953, at the Oakland Airport, in the County of Alameda, State of California, the undersigned suffered a loss of United States currency and coin in the amount of \$15,728.57, which to the best of its knowledge and belief, was caused by the dishonesty of one or more of its employees.

Attached hereto and made a part of this Proof of Loss are schedules marked Appendix A itemizing said loss.

Also attached hereto marked Appendix B and made a part hereof is a copy of a letter dated December 18, 1953, addressed to the undersigned by

the Chief of Police of the City of Oakland, County of Alameda, State of California, advising the undersigned of the investigation made by said police of the facts and circumstances surrounding said loss, and advising the undersigned that in the opinion of the police the loss was due to a theft committed by one of the employes of the undersigned or by some unknown person under the supervision and control of an employe. This report of the Oakland police is submitted as evidence reasonably establishing that the loss was in fact due to the fraud or dishonesty of one or more of the employes of the undersigned as required by the terms of said policy. The detailed reports of the police investigation forming the basis of the attached letter are available to you for your examination in the files of the Police Department in the City of Oakland, County of Alameda, State of California.

Written notice of said loss was given to you on or about December 1, 1953, and thereafter you were furnished with the itemized schedules attached hereto as Appendix A and a copy of Appendix B together with a written claim.

The undersigned hereby makes claim upon you under the terms of said policy in the sum of \$15,728.57 in full and final settlement of the loss referred to.

The undersigned certifies that said loss was not caused by design or procurement on its part; nothing has been done by or with its privity or consent, to violate the conditions of the policy, or render it void. Said property, to wit, the sum of \$15,728.57

in United States currency and coin, was at the time of said loss solely the property of the undersigned and none of said property has been saved, recovered or in any manner concealed by the undersigned or by anyone acting in privity with it.

Any other information within our possession or under our control that you may require will be furnished on call and considered a part of this proof.

Dated at Washington, D. C., this 24th day of February, 1954.

INDEPENDENT MILITARY AIR TRANSPORT
ASSOCIATION, a Corporation,

By /s/ JOSEPH A. REILLY.

United States of America,
District of Columbia—ss.

On the day and date above written before me Marian W. Flory, a Notary Public, personally appeared Joseph A. Reilly, known to me to be the Treasurer of Independent Military Air Transport Association, a corporation, and the individual who signed the foregoing statements in the name of and on behalf of said corporation, and he made solemn oath to the truth of the same and that no material fact is withheld of which said insurers should be advised.

[Seal] /s/ MARIAN W. FLORY,
Notary Public.

Commission expires July 14, 1955.

APPENDIX A

Independent Military Air Transport Association

Carrier Gross Revenues

Four Flights from Oakland, California

November 25, 1953

	Fares	Revenue Tax	Total
Coastal Cargo Co., Inc. N 1683M			
42 IMATA PAX, OAK-LGA	\$ 4,158.00	\$ 623.70	\$ 4,781.70
==			
Transocean Air Lines N 68967			
16 IMATA PAX, OAK-MEM	\$ 1,229.76	\$ 184.48	\$ 1,414.24
13 IMATA PAX, OAK-ATL	1,285.44	192.79	1,478.23
13 IMATA PAX, OAK-DCA	1,352.00	202.80	1,554.80
—			
42 IMATA PAX	\$ 3,867.20	\$ 580.07	\$ 4,447.27
==			
Capitol Airways, Inc. N 1647M			
9 IMATA PAX, OAK-MKC	\$ 675.00	\$ 101.25	\$ 776.25

39 IMATA PAX, OAK-CHI	\$ 2,925.00	\$ 438.75	\$ 3,363.75
48 IMATA PAX	\$ 3,600.00	\$ 540.00	\$ 4,140.00
2 Agency PAC, OAK-CHI	150.00	22.50	172.50
50 PAX	\$ 3,750.00	\$ 562.50	\$ 4,312.50
Capitol Airways, Inc. N 1308V			
12 IMATA PAX, OAK-CHI	\$ 900.00	\$ 135.00	\$ 1,035.00
33 IMATA PAX, OAK-LGA	3,267.00	490.05	3,757.05
45 IMATA PAX	\$ 4,167.00	\$ 625.05	\$ 4,792.05
3 Agency PAX, OAK-CHI	\$ 225.00	\$ 33.75	\$ 258.75
2 Agency PAX, OAK-IGA	198.00	29.70	227.70
5 Agency PAX	\$ 423.00	\$ 63.45	\$ 486.45
50 PAX	\$ 4,590.00	\$ 688.50	\$ 5,278.50

Independent Military Air Transport Association

Summary Accounting of All Revenues
Four Flights from Oakland, California
November 25, 1953

Total Accountable Revenue

Gross Revenues for Fares and Taxes:

Coastal Cargo Co., Inc. N 1683M	\$ 4,781.70
Transocean Air Lines N 68967	4,447.27
Capitol Airways, Inc. N 1647M	4,312.50
Capitol Airways, Inc. N 1308V	5,278.50
	<hr/>
	\$18,819.97

Change Funds

200.00
20.00
20.00

PPR Refunded at Treasure Island from Change Fund #10659

PPR Outstanding 11/27/53 #10583 PAX Cleary, K.H.

Total Revenue

\$19,059.97

Total Revenue Accounting

Agency Check sent directly to Capitol Airways	150.00
Agency Commission Deducted	22.50
	<hr/>
Agency Check Sent to IMATA, endorsed by Capitol Airways	375.00
IMATA Receivable from Agency	48.00
Agency Commission Deducted	63.45
	<hr/>
	486.45

IMATA Cash Report, Treasure Island, 11-25		\$ 1,730.84
IMATA Cash Report, Parks AFB, 11-25		172.50
IMATA Cash Report, San Diego, 11-24		445.22
Change Funds on Hand 12/3/53:		
Treasure Island	\$ 5.00	
Fort Ord	100.00	
Parks AFB	75.00	
PPR Refunded: Change Fund, Treasure Island #10659	20.00	
<hr/>		
Receivable from PAX Gibson, Ticket #4474,		
Tariff Undercharge		10.00
Receivable from PAX Bowes, Ticket #4421,		
Tariff Undercharge		31.21
Payable to PAX Clemens, Ticket #4522,		
Refund Underpayment		(27.60)
Part-time Labor Expense		38.00
Receivable from 6 PAX for Shuttles, San to Oak.		71.76
Cash Report Shortage, San Diego 11-2452
Cash Loss at Oakland, Calif.		15,728.57
<hr/>		
Total Accounting		\$19,059.97
<hr/>		

Independent Military Air Transport Association.

Payments to Carriers
Four Flights from Oakland, California
November 25, 1953

Coastal Cargo Co., Inc. N 1683M

Total IMATA Revenues	\$ 4,781.70
Less: IMATA Commission	623.70

\$ 4,158.00

IMATA Check No. 1373, Bank of America

Transocean Air Lines N 68967

Total IMATA Revenues	\$ 4,447.27
Less: IMATA Commission	580.07

\$ 3,867.20

IMATA Check No. 1378, Bank of America

Capitol Airways, Inc. N 1647M

Total IMATA Revenues	\$ 4,140.00
Total Agency Revenues	172.50

\$ 4,312.50

Less: IMATA Commission	\$ 540.00		
Agency Commission	22.50	\$ 562.50	\$ 3,750.00
Payment of Agency to Carrier			150.00
IMATA Check No. 2928, Liberty Bank			\$ 3,600.00
Capitol Airways, Inc. N 1308V			
Total IMATA Revenues	\$ 4,792.05		
Total Agency Revenues	486.45	\$ 5,278.50	
Less: IMATA Commission	625.05		
Agency Commission	63.45	688.50	
IMATA Check No. 2977, Liberty Bank			\$ 4,590.00
Agency Check Paid to IMATA at DCA, via Capitol Airways' endorsement to IMATA			375.00
IMATA, DCA, Billing to Agency for shortage in Agency check, supported by Agency I. O. U.			48.00
IMATA Collections from Agency at DCA			\$ 423.00



	(1) Total Fares	Total Tax	Total Cash
port			
1	\$ 2,274.76	\$ 341.21	\$ 2,615.97
2	2,377.06	356.57	2,702.42
3	2,666.62	399.98	3,056.60
4	2,484.00	372.60	2,884.20
5	2,290.88	343.63	2,634.51
6	2,604.00	390.60	2,994.60
7			
"			
"	494.88	74.23	571.11

Tr	\$15,192.20	\$2,278.82	\$17,459.41
----	-------------	------------	-------------

port

1

"	450.00	67.50	445.22
---	--------	-------	--------

port

1

	150.00	22.50	172.50
--	--------	-------	--------

s	\$15,792.20	\$2,368.82	\$18,077.13
---	-------------	------------	-------------

Ac

Tot

Bal

S

Baines	\$ 3,867.20	
--------	-------------	--

I	4,158.00	
---	----------	--

Bal	7,767.00	\$15,792.20
-----	----------	-------------

(

		2,368.82
--	--	----------

Tot		67.60
-----	--	-------

		\$18,228.62
--	--	-------------

es	\$ 38.52	
----	----------	--

bles	112.97	151.49
------	--------	--------

sh		\$18,077.13
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1) Capito

APPENDIX B

City of Oakland
California Police Department
Address All Correspondence to
Lester J. Divine, Chief of Police

In Reply Refer to
Insp. A. Mallon
Insp. Gustavson
Grand Theft Detail
N-51826

December 18, 1953.

Ramsay D. Potts, Jr.,
Independent Military,
Air Transport Assoc.,
1025 Connecticut Ave.,
Washington, D. C.

Dear Sir:

In reply to your letter of 15 December 53 the following is a resume of the investigation by our Grand Theft Detail.

There were no signs of illegal entry into the office, either through the front door or the back door. A window had been left open, however the area surrounding it was observed by our technician, Officer Lucas. The presence of cobwebs at the opening of this window and undisturbed dust gathered at the landing where a person would have had to step left no doubt that there had been no entry made at this point.

The rear door has both a lock and a bolt, and although the lock could have been easily slipped it would have been impossible to tamper with the bolt. As this door was still bolted on Saturday morning (according to the employees) there could not have been an entry made through this door.

The front door has one lock on it and according to Inspector Gustavson's observation it would have been impossible to slip this lock. The construction of this door and also the numerous coats of paint which have been applied to it prevented any entry.

It was then the conclusion of this detail that the only means of entry was by the front door and by the use of a key.

Our investigation revealed only five keys available. Four being in the hands of the employees and one in the possession of the janitor.

Lieutenant Waters, Inspectors Gustavson and Mallon and Criminologist Cooper checked the desk of Mr. Scott and found absolutely no evidence of a forced entry. Technician Lucas found no prints on either the desk of Mr. Scott or the cash box. Also there was no evidence of tampering with this cash box.

The cash box in question was taken to the Police Department and it was found to be locked accidentally. Lieut. Waters and others tried for over an hour to open this box by using every type of picklocks to no avail. Due to the fact that the box had not been tampered with; the further fact that

after it had been opened and the money taken it was again locked, it is conclusive that a key had been used to open this box. A thorough check both inside and outside by our Criminologist, Robert Cooper, failed to reveal any identifying fingerprints.

It is the conclusion of this Detail that this theft was committed by one of the employees, or was committed by some unknown person under the supervision and control of an employee.

All of the employees, including the janitor, were placed on the lie detector. They were all cleared with the exception of Mr. Scott and Mr. Farquhar.

Mr. Farquhar was thoroughly checked as to his actions after leaving the office and he was cleared.

It was learned that Mr. Scott made a long distance telephone call to your office at 9:10 p.m. and talked for two minutes and twenty-seven seconds. This call plus one to his wife and one to another employee, Dick Held, were made after Mr. Scott returned to the office. Mr. Scott remembers calling his wife but does not remember calling the head office, nor does he remember calling Mr. Held. He further states that he then left the airport and arrived home a few minutes prior to 10:00 p.m. Insp. Mallon made this trip during daylight hours under normal conditions and it took forty-five minutes. The night that Mr. Scott left the airport was the foggiest night we have had this year. All planes were grounded. The ground visibility was extremely limited and Mr. Scott insists that he was home before 10:00 p.m.

The fact that the call was made to Washington, D. C., at 9:10 p.m. it would be reasonable to assume that it would be about 9:20 p.m. before Mr. Scott finished the call and walked to the parking lot to get his car. This would give him less than forty minutes to get home. Faced with these facts Mr. Scott stated that it seemed impossible but he did it. His wife also substantiated his getting home by 10:00 p.m.

Our investigation is still continuing and we are still pursuing along our original lines ending further developments.

Yours very truly,

/s/ LESTER J. DIVINE,
Chief of Police.

AM:ns

Received December 22, 1953.

[Endorsed]: Filed March 30, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS AND IN
THE ALTERNATE TO STRIKE

To Independent Military Air Transport Association,
a corporation, plaintiff in the above-entitled
cause, and to its attorneys, Richard Ernst and
R. L. Miller, 16 California Street, San Fran-
cisco 11, California:

Please Take Notice that the undersigned will
move this court at the United States Courthouse in

the City of San Francisco on the 26th day of April, 1954, at 9:00 o'clock a.m. or as soon as counsel may be heard, for an order that the above-entitled action be dismissed on the following grounds: Failure to state a claim upon which relief can be granted.

In the alternative, if the above motion be denied, that there be stricken from said complaint the following:

I.

From Paragraph IV on Page 3, commencing with "Said loss and the facts and circumstances" in Line 11 thereof, and ending with "and control of an employee" in Line 16 thereof, on the grounds:

- a. That the matters therein stated are incompetent;
- b. That the matters therein stated are heresay;
- c. That the matters therein stated attempt to express a conclusion of opinion of the Police Department;
- d. That the matters therein stated attempt to plead evidence that would not be admissible in court and the permitting of the same in said complaint is prejudicial to this defendant.

II.

To strike from said complaint Exhibit B thereof, or in the alternative to strike from said Exhibit B, on the grounds that said Exhibit B and the documents attached thereto recite matters which are incompetent, heresay, attempts to recite opinions and

conclusions of other parties and an attempt to recite matters by pleading which would not be admissible as evidence and that are highly prejudicial to the rights of this defendant.

III.

If said motion be denied then said defendant will move the court to strike from said Exhibit B on the grounds hereinbefore stated, all matters in said Exhibit B and in the documents attached thereto having any reference to statements made or letters written by or opinions expressed by the Chief of Police of the City of Oakland, or the Oakland Police, or the Police Department, and particularly all matters stated in that portion of the document entitled "Proof of Loss" attached to said complaint and referred to in the complaint as "Exhibit B," commencing with the third paragraph thereof on Page 1 with the words, "Also attached hereto marked Appendix B" and ending with the end of said paragraph on Page 2 of said Exhibit B with the words "in the City of Oakland, County of Alameda, State of California."

IV.

Also to strike from said complaint the document referred to in Exhibit B as "Appendix B," being a letter, or copy of a letter, dated December 18, 1953, addressed to Ramsay D. Potts, Jr., Independent Military Air Transport Assoc., 1025 Connecticut Ave., Washington, D. C., and signed by Lester J. Divine, Chief of Police, on the grounds that the said letter is incompetent, hearsay, an expression

of an opinion, a conclusion of the writer, and that said document contains statements which would be inadmissible as evidence in a trial of the case, and is an attempt to place in the record matters which would not be admissible in evidence in a trial, and matters which are highly prejudicial to the rights of this defendant.

/s/ THOMAS E. DAVIS,
Attorney for Defendant.

Service of copy acknowledged.

Memorandum of Points and Authorities

Matters which are incompetent or irrelevant or prejudicial may be stricken from the complaint:

12 Fed. Rules Service 12 F. 21, case 4, page 139;
S. K. Williams Co. v. Mechanics Educational
Society of America. U. S. District Court,
Northern District of Ohio (May 20, 1949).

I.

Said complaint does not state a claim upon which relief can be granted:

There is no allegation in the complaint to the effect that plaintiff alleges either directly or on information and belief, that the plaintiff has sustained any loss by reason of any fraud or dishonesty on the part of any employee or employees of the plaintiff.

The allegations in that respect being "Said loss

is alleged to have been caused by the fraud and dishonesty of one or more of the plaintiff's employees and plaintiff is unable to designate the specific employee or employees causing such loss.' It is not said by whom said loss is alleged to have been caused. It is not a statement that plaintiff alleges that it has been so caused.

Respectfully submitted,

/s/ THOMAS E. DAVIS,

[Endorsed]: Filed April 16, 1954.

[Title of District Court and Cause.]

ANSWER

Comes Now the Defendant in the above-entitled cause and for answer to plaintiff's complaint herein admits, denies and alleges as follows:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

The defendant admits the allegations of Paragraphs I, II and III of said complaint; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV of said complaint, and denies each and every allegation therein contained.

II.

Answering Paragraph V of said complaint, said defendant admits that the plaintiff gave the defendant written notices and delivered to the defendant certain schedules and filed with this defendant a document entitled Proof of Loss, copy of which is attached to said complaint and marked "Exhibit B."

III.

Answering Paragraph VI of said complaint, said defendant admits that it has failed and refused and still fails and refuses to pay the plaintiff said claim or any portion thereof, but denies that such failure or refusal is wrongful or without cost.

IV.

Denies each and every allegation in said complaint not hereinbefore admitted, or specifically denied, and denies that there is due, owing or unpaid from this defendant to plaintiff, the amount stated in said complaint or any other amount.

/s/ THOMAS E. DAVIS,

Attorney for Defendant General Accident, Fire and Life Assurance Corporation, Limited, a Corporation.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 8, 1954.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER
FOR JUDGMENT

Defendant contracted to indemnify plaintiff for any loss, up to \$50,000.00 which the evidence submitted "reasonably establishes," was due to the fraud or dishonesty of one or more of plaintiff's employees acting alone or in collusion with others. The evidence does reasonably establish that the loss incurred by plaintiff was due to the dishonesty of one or more of its employees, rather than to the act of a stranger. The presumption of innocence, upon which defendant heavily relies, is inapplicable. For it is not disputed that an act of fraud or dishonesty was committed. Proof that a particular person committed the act is not required.

Defendant has expressed concern that a judgment in plaintiff's favor will unfairly brand plaintiff's employees as felons. But, the employees are not parties to this action. The judgment here does not brand any one of them as a wrongdoer any more than do the facts themselves.

Judgment may enter for plaintiff upon findings presented according to the Rules.

Dated: April 26, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 27, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Court, sitting without a jury, Messrs. Richard Ernst and R. L. Miller appearing as attorneys for plaintiff and Thomas E. Davis, Esquire appearing as attorney for defendant, and was tried on February 17, 1955, and evidence having been adduced, the matter fully argued and memoranda of authorities filed by both parties, and the Court being fully advised in the premises now makes the following

Findings of Fact

I.

Plaintiff is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the District of Columbia, and defendant is a corporation organized and existing under the laws of the Kingdom of Great Britain doing business in the State of California and having an office in said state in the City and County of San Francisco. The matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars (\$3,000.00).

II.

On October 15, 1952, defendant issued to plaintiff a Comprehensive Dishonesty, Disappearance and Destruction Policy of insurance whereby defendant

agreed with plaintiff, among other things, to indemnify plaintiff for all loss, to a limit of Fifty Thousand Dollars (\$50,000.00) sustained by plaintiff during the term of the said policy:

“1. Through any fraudulent or dishonest act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and including that part of any inventory shortage which the Assured shall conclusively prove to have been caused by the fraud or dishonesty of any of the Employees, the amount of insurance on each of such Employees being the Limit of Liability applicable to this Insuring Agreement 1.”

By said policy defendant further agreed:

“If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the Employees and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agreement, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the Limit of Liability applicable to this Insuring Agreement 1.”

III.

Plaintiff has paid to defendant all premiums required by the terms of the said policy and has kept and performed all terms and conditions thereof on its part to be kept and performed, and said policy was in full force and effect on November 27th and 28th, 1953.

IV.

On November 27th or 28th, 1953, plaintiff suffered a loss of Fifteen Thousand Seven Hundred Twenty-eight Dollars and Fifty-seven cents (\$15,-728.57) in United States currency and coin by theft from a cash box in a drawer of a desk of an office occupied and used solely by plaintiff and its employees at the Oakland Municipal Airport in the City of Oakland, County of Alameda, State of California. Said premises are specifically covered by the said policy.

V.

The said loss was alleged by plaintiff to be and the evidence adduced reasonably establishes that it was due to the dishonesty of one or more of plaintiff's employees, rather than to the act of a stranger.

VI.

On December 1, 1953, plaintiff gave to the defendant written notice of the said loss and thereafter and on December 28, 1953, plaintiff delivered to defendant schedules itemizing said loss. Thereafter on March 1, 1954, within the time prescribed by the terms and conditions of said policy of insurance,

plaintiff prepared and filed with defendant affirmative, itemized proof of loss duly sworn to in full compliance with the terms of said policy of insurance, showing the loss to be in the sum of Fifteen Thousand Seven Hundred Twenty-eight Dollars and Fifty-seven cents (\$15,728.57) and made a demand for said sum under the terms of the said policy.

VII.

Defendant failed, refused and neglected to pay plaintiff the said sum of Fifteen Thousand Seven Hundred Twenty-eight Dollars and Fifty-seven cents (\$15,728.57) and neither the whole nor any part thereof has ever been paid to plaintiff.

Upon the above findings of fact the Court now makes the following

Conclusions of Law

The Court has jurisdiction of this action under the provisions of Title 28 United States Code, Section 1332.

II.

Plaintiff is entitled to judgment against defendant in the sum of Fifteen Thousand Seven Hundred Twenty-eight Dollars and Fifty-seven cents (\$15,728.57) with interest thereon at the rate of six per cent (6%) per annum from March 1, 1954, to the date of entry of judgment, together with its costs of suit to be taxed by the Clerk.

Let Judgment Be Entered Accordingly.

Dated: June 15th, 1955.

/s/ LOUIS E. GOODMAN,

United States District Judge.

Receipt of copy acknowledged.

Lodged May 2, 1955.

[Endorsed]: Filed June 16, 1955.

District Court of the United States, Northern
District of California, Southern Division
Civil No. 33441

INDEPENDENT MILITARY AIR TRANS-
PORT ASSOCIATION, a Corporation,

Plaintiff,

vs.

GENERAL ACCIDENT, FIRE AND LIFE AS-
SURANCE CORPORATION, LIMITED, a
Corporation,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the Court, sitting without a jury, Messrs. Richard Ernst and R. L. Miller appearing as attorneys for plaintiff and Thomas E. Davis, Esquire, appearing as attorney for defendant, and was tried on February 17, 1955, and evidence having been adduced, the matter fully argued and memoranda of authorities filed by both parties, and the Court having filed herein its memorandum and Order for Judgment and its Findings of Fact and Conclusions of Law.

Now Therefore, It Is Ordered, Adjudged and Decreed that plaintiff have judgment against defendant in the sum of Fifteen Thousand Seven Hundred Twenty-eight Dollars and Fifty-seven cents (\$15,728.57) together with interest thereon at the rate of six per cent (6%) per annum from March 1, 1954, to the date of this judgment, and for its costs of suit, to be taxed and hereinafter inserted by the Clerk of this Court in the sum of \$.....

Dated: June 15th, 1955.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Lodged May 2, 1955.

[Endorsed]: Filed June 16, 1955.

Entered June 17, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That General Accident, Fire and Life Assurance Corporation, Limited, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 17, 1955.

/s/ THOMAS E. DAVIS,
Attorney for Appellant, General Accident, Fire and Life Assurance Corporation, Limited.

Receipt of copy acknowledged.

[Endorsed]: Filed June 28, 1955.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 33441

INDEPENDENT MILITARY AIR TRANSPORT ASSOCIATION, a Corporation,

Plaintiff,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION, LIMITED, a Corporation,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For Plaintiff:

RICHARD ERNST, ESQ.,
R. L. MILLER, ESQ.,
16 California Street,
San Francisco, California.

For Defendant:

THOMAS E. DAVIS, ESQ.,
405 Montgomery Street.

February 17, 1955, 10:00 P.M.

The Clerk: Independent Military Air Transport Association versus General Accident, Fire and Life Assurance Corporation, Court trial.

Mr. Miller: Ready.

Mr. Davis: Ready.

The Clerk: Will respective counsel please state their appearance for the record.

Mr. Miller: For the plaintiff, R. L. Miller and Richard Ernst.

Mr. Davis: Thomas E. Davis for the defendant.

Mr. Miller: Your Honor, I think that we can expedite this matter if I make a very brief statement. You will recall we were before you for a pre-trial conference.

The Court: Yes, I have read the pleadings.

Mr. Miller: The issues then are narrowed to two things, the amount of the loss and whether or not the loss was covered by the insurance policy.

So with that preliminary statement, if your Honor has read the pleadings, you are familiar with the provisions of the insurance policy, and it is our position that all we must present here is reasonable evidence that the loss was due to the dishonesty of an employee, even though that employee is [3*] unknown.

I will call as the first witness for the plaintiff, Mr. Roach.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

FRANCIS J. ROACH

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Will you please state your name to the Court.

The Witness: Francis J. Roach.

Direct Examination

By Mr. Miller:

Q. What is your address, Mr. Roach?

A. 1706 Commonwealth Avenue, Alexandria, Virginia.

Q. And are you an employee of Independent Military Air Transport Association?

A. Yes, sir, I am.

Q. What is your position with that company?

A. I am comptroller.

Q. And how long have you occupied that position? A. Since July 23, 1952.

Q. And you were comptroller for Independent Military Air Transport Association during the month of November of 1953?

A. Yes, sir; I was.

Q. And were you at that time informed of a loss that the company had suffered?

A. Yes, sir, I was. [4]

Q. And from whom did you get that information?

A. I received it from Mr. George Hogue, who was the supervisor of field activities.

(Testimony of Francis J. Roach.)

Q. And did you later ascertain the amount of that loss? A. Yes, sir, I did.

Q. And how did you ascertain the amount of the loss?

A. By normal accounting procedures. We began by calculating the exact amount of tickets which were presented to us by the airlines in the carrying of passengers. We subtracted from the value of the tickets, we subtracted all of the money that was recovered and deposited into the Bank of America, and with detailed calculations which were presented as part of the complaint, the balance of the money was believed to be the exact amount that was stolen or lost.

Q. You were not at that time in California?

A. No, sir, I was not.

Q. You were not in Oakland at the time the loss occurred? A. That's right.

Q. Do you know of your own knowledge whether any part of this—Well, withdraw that question.

What did your calculations show as to the amount of the loss?

A. I don't recall the exact figures. It was \$15,700.

Q. I will show you a statement which is an exact copy, Mr. Davis, this is a carbon copy of the statement that was [5] attached to the claim you have in your file, and——

Mr. Davis: Attached to the complaint, you mean?

Mr. Miller: Yes, attached to the complaint; also

(Testimony of Francis J. Roach.)

attached to the claim; also attached to the complaint.

Q. (By Mr. Miller): And was that statement prepared by you? A. Yes, every word of it.

Q. And that is the statement that was made and exhibited and attached to the complaint in this action? A. Yes, sir, it was.

Q. And what does that show?

A. The amount of the——

Q. The loss as computed by you?

A. Yes, sir, it does.

Q. And by reference to that, can you at this time tell us what that amount was?

A. It was \$15,728.57.

Q. Do you recall that at the time this loss that was reported to you, that the money that was allegedly stolen at Oakland was all currency?

A. I recall that it was not all currency.

Q. It was not all currency? Now, do you know of your own knowledge whether any part of this fifteen, round figures, \$15,000 has been recovered by your employer?

A. I know that nothing of this amount has been recovered by the employer in any way. [6]

Q. Prior to November 27, 1954, did you issue, as comptroller for Independent Military Air Transport Association, did you issue any instructions to the person or persons in charge of your Oakland office as to how cash should be handled?

A. Yes, sir, I did.

(Testimony of Francis J. Roach.)

Q. In what form were those instructions?

A. Some of them were in written memorandum form, and some of them were conversations and some were teletype messages.

Q. Do you recall approximately when the first instructions were issued as to how cash should be handled?

A. Yes, it was in April of 1954—1953, I am sorry.

Q. Did you know that during the week of November, immediately preceding November 28, 1953, that your Oakland office was collecting large amounts of cash?

A. I was aware that there was a possibility that they might, but I wasn't certain.

Q. Do you remember during that week that they had collected large amounts of cash?

A. The first I knew of it was when Mr. Scott called me at my home on November 25 and told me approximately how much money he thought he had with him.

Q. Do you recall about how much he had at that time, or said he had?

A. He said it was over \$15,000, but he was not certain.

Q. That was on November 25? [7]

A. Yes, sir.

Q. What time of the day was that call?

A. I received it in my home at nine p.m. Eastern Standard Time.

(Testimony of Francis J. Roach.)

Q. Did you at that time give him any instructions as to what he should do with this money?

A. Yes, we discussed considerable alternate possibilities and we, we decided that—I instructed him to take the money to Western Union and purchase a Western Union money order for it, and have it sent to himself in order that he might complete his cash report at his leisure.

Q. Do you know whether he followed those instructions?

A. I didn't know he didn't follow those instructions until I was notified of the loss.

Q. You say that was Mr. Homer Scott?

A. Mr. George Hogue was the one who notified me.

Q. But I mean this telephone conversation was with Mr. Scott? A. It was with Mr. Scott.

Q. What was Mr. Scott's position with the IMATA at that time?

A. He was manager of the Oakland office.

Mr. Miller: For the sake of the Reporter and the Court, we are all so familiar that we refer to the plaintiff as IMATA rather than its full name. If I slip into that fallacy, if no one has an objections, it might be easier to call it [8] IMATA in line with many other agencies today that use the letters as abbreviations of their name.

Q. (By Mr. Miller): He was then in charge of the Oakland office? A. He was.

Q. And he was the employee of the company who was responsible for the safekeeping of this money?

(Testimony of Francis J. Roach.)

A. He was, yes.

Mr. Miller: You may cross-examine, counsel.

Cross-Examination

By Mr. Davis:

Q. In general, what is the business of the plaintiff, your employer?

A. The general business is military agent for the member airlines in contracting for official military transportation and servicing the transportation officers at the field and assisting military personnel to travel on furlough, if available.

Q. Prior to November, 1953, had this office been functioning in the same place with the same personnel?

A. Yes, sir, it had been.

Q. Yes. Prior to that time who purchased the transportation and paid for it that was being obtained through your office in Oakland?

A. There were two kinds, sir. The Department of Defense purchased most of it, and a very small amount was purchased [9] by individual military personnel.

Q. And the money, or the transportation that was purchased by the Department of Defense would be paid in what form?

A. By the airline billing to the finance officers in Washington, D. C., receiving payment by check.

Q. And no money, no currency or cash would come into your Oakland office?

A. No, sir.

Q. On account of such purchases.

Now, prior to November, 1953, what amount

(Testimony of Francis J. Roach.)

would be the average amount, say, per month of cash that would be received by the Oakland office from the sale of independent tickets—or individual tickets to personnel?

A. There were some months when it was nothing and some months when it was as high as \$20,000, and it varied; sometimes zero and sometimes that much.

Q. Now, what was done with that cash that was received?

A. It was deposited in our bank account at the Bank of America.

Q. Where?

A. At the nearest one, as far as I know.

Q. I beg your pardon, I didn't hear that. What branch?

A. Our exact account was with the Bank of America in Burbank.

Q. Burbank, California? [10]

A. Yes, sir. The deposits were made to any branch of the Bank of America.

Q. And you know what branch had been used?

A. I know that the branch was used at Parks Air Force Base.

Q. Parks Air Force Base; where is that located?

A. I am not certain.

Q. You are not familiar with the local geography of Oakland Airport and vicinity?

A. I was there, sir, at Parks Air Force Base, but I can't define it.

(Testimony of Francis J. Roach.)

Q. I was going to say how many miles is it from your office?

A. I believe it is about fifteen or twenty miles.

Q. About fifteen or twenty miles.

Now, when you received this telephone call from Mr. Scott, you remember what day of the week that was?

A. It was a Wednesday.

Q. That was the Wednesday evening before Thanksgiving Day?

A. Yes, sir; it was.

Q. Yes. And your instructions to him were what?

A. To purchase a Western Union money order at the Western Union office at the Oakland Municipal Airport.

Q. Yes. And was that the last instructions that were conveyed to him by you?

A. Yes, sir. [11]

Q. Do you know why that—ever explained to you why that wasn't purchased?

A. An employee of our company investigated the loss on the scene and he reported to me.

Q. I am asking you——

A. Only what I heard.

Q. What?

A. Only what I have heard from other reports.

Q. I see.

Now, in arriving at the amount, I understood you to say that you obtained this information from records furnished you by the airlines that carry the passengers whose tickets were purchased through this agency in Oakland, or this office?

(Testimony of Francis J. Roach.)

A. I am sorry, I must have oversimplified it. Our personnel made out a ticket of which we had a carbon copy. The ticket was given to the airline and the airline sent us a bill attaching the tickets, and we paid the airline as proof of service.

Q. So that those tickets, the carbon copies, are tickets made by your Oakland office?

A. Yes, sir; they were.

Q. Now, were those made up by the Oakland office in Treasure Island? A. Yes, sir.

Q. Wasn't it a fact that practically all these tickets were [12] sold on Treasure Island?

A. Yes, sir; they were.

Q. Yes. Now, these copies you are talking about, isn't it a fact they were made up at Treasure Island? A. Yes, sir; they were.

Q. And the money was received at Treasure Island? A. Yes, sir.

Q. Yes.

Mr. Davis: I think that is all.

Mr. Miller: Just one more question.

Redirect Examination

By Mr. Miller:

Q. Mr. Roach, did you receive from your Oakland office a cash report that was made up by the office there? A. Yes, sir; I did.

Mr. Miller: Have you seen this, Mr. Davis?

Q. (By Mr. Miller): I show you, Mr. Roach, a document captioned "IMATA Cash Report No.

(Testimony of Francis J. Roach.)

1125'' and ask you if that is the cash report that you received from your Oakland office and from which you prepared the final statement that formed an exhibit to the complaint?

A. Yes, sir; this is it.

Q. Now, I will call your attention that on Page 7 of this document, there appears a statement, "Total loss," followed by the figures, "\$15,554.86," while the figure that you have [13] testified to as appearing as a claim in your complaint was some \$15,700, and I ask you how you account for that difference?

A. I distinctly recall that there was one particular ticket which was not listed on this cash report which was prepared by our office and forwarded to us by a carrier.

Mr. Davis: I couldn't hear that last part.

The Witness (Continuing): There was one ticket that was prepared by our office given to a carrier, the carrier paid in money and then discovered it was left off this cash report, and it was approximately for \$100.00. And in addition to the change funds were included in the funds that were then collected and the change funds amounted to about \$200.00, and part of that was lost, too.

Q. So that those discrepancies were due, as you recall, to the fact that one ticket was not included in this one cash report that was included in your final report——

A. Yes, sir.

Q. ——and certain adjustments in the change account?

A. That's right, sir.

(Testimony of Francis J. Roach.)

Mr. Miller: I have no further questions.

Mr. Davis: No questions.

The Court: You want to mark that in some way?

Mr. Miller: I would like to have this marked for identification, your Honor. Not going, at this time, to offer it in evidence. [14]

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Whereupon document referred to was marked Plaintiff's Exhibit No. 1 for Identification only.)

Mr. Miller: You may step down.

(Witness excused.)

Mr. Miller: Mr. Robert Farquhar.

ROBERT LEE FARQUHAR

was called as a witness on behalf of the plaintiff and, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Robert Lee Farquhar.

Direct Examination

By Mr. Miller:

Q. What is your present address, Mr. Farquhar?

A. 2243 Santa Clara Avenue, Alameda.

Q. And by whom are you employed?

A. The Independent Military Air Transport Association.

(Testimony of Robert Lee Farquhar.)

Q. That is the plaintiff in this action?

A. Yes.

Q. How long have you been employed by the Independent Military Air Transport Association?

A. Since the latter part of October, 1953. [15]

Q. Then you were employed by IMATA at the time of this loss that we have referred to here?

A. Yes, I was.

Q. What was your position at that time with them?

A. Well, I was one, I think, of seven or eight employees under Mr. Scott and I was, worked both on official and unofficial traffic. I think my main job was the unofficial traffic, which was the ticketing of individual passengers.

Q. And did that include the selling of tickets and collecting of cash?

A. Yes; it did.

Q. And during the week of November 25 to 28, or the week ending November 28, 1953, were you engaged on behalf of your employer in the selling of transportation?

A. Yes; I was.

Q. And the collecting of cash?

A. Yes; I was.

Q. And where did those operations take place?

A. At Treasure Island; the bulk of it was at Treasure Island.

Q. Was any of it done at Parks Air Force Base?

A. I don't think so at the time. I couldn't be sure, but I know that most of it, I mean all of it, really, as far as I remember, was done at Treasure Island.

(Testimony of Robert Lee Farquhar.)

Q. And what was your—would you just describe briefly [16] to us the procedure of receiving and handling of this cash and what you did with the cash money you took in?

A. Well, Marines would come in usually, oh, in groups of up to three thousand. As I remember, this is a very large move, probably about two thousand Marines coming in through Treasure Island for re-assignment and discharge, and I think they arrived by ship on, oh, Friday or Saturday—I think it was Saturday, and on Monday.

Q. Now, when you say “Monday,” can you fix the day of the month? Was it Monday of the week which ended on November 28? A. Yes.

The Court: Monday before Thanksgiving.

The Witness: Right.

Q. (By Mr. Miller): Monday before Thanksgiving?

A. Yes. As a matter of fact, we went over there on Sunday, which we had more or less of gentleman’s agreement with the other two associations that we wouldn’t sell on Sunday.

Q. Yes.

A. And we went that Monday with the cash box and we had change in that box to make change with.

Q. Yes. Now, when you say “we,” who do you mean, Mr. Farquhar?

A. Well, now, Mr. Held was over there and we had a Miss Ferris also——

Mr. Davis: What is that name?

(Testimony of Robert Lee Farquhar.)

The Witness: Miss Ferris, Peggy Lois [17]
Ferris.

Mr. Davis: Spell it.

The Witness: I think it is F-e-r-r-i-s. I am not sure of the spelling now.

Q. (By Mr. Miller): And those persons, Mr. Held and this Miss Ferris were also employees of IMATA? A. Yes.

Q. And they were employed—were they full-time employees? A. Yes; they were.

Q. They were employed to perform the same type of service you were in the selling of this transportation? A. Yes.

Q. You may proceed. After you sold tickets, you received cash. Now, what did you do with this cash?

A. We didn't sell tickets to begin with Monday morning when we all opened up. The procedure was to make reservations and if possible collect a deposit.

Now, the men weren't paid off, you see, until the 25th. That is the day they were due to depart. So you couldn't, they didn't have the money to pay the full fare. We collected the deposit, of course, as much as we could get, usually from five to ten dollars, or occasionally a twenty-dollar deposit.

So, at the end of each day, we would make reservations, we would bring the cash box back to the office in Oakland.

Q. That office was at the Oakland Airport?

A. At the Oakland Airport. [18]

Q. Well, when the cash box was brought back

(Testimony of Robert Lee Farquhar.)

there, let's take first Monday night, what was done with it? First, what was done with the money in the cash box?

A. Well, now, that I can't remember exactly. I know that—by that I mean I can't remember the sequence of days there up until Wednesday, of course. I remember on Wednesday, but I think the bulk of the money was left at the office and we took just enough back the following Monday morning to make change again.

Q. With whom was that money left, the bulk of the money?

A. Well, either with Mr. Scott or Mrs. Keene. I can't remember exactly.

Q. Who was your superior in that office at that time? A. Mr. Scott.

Q. That's Homer Scott? A. Yes, sir.

Q. Now, as to Wednesday of that week, do you remember coming back from Treasure Island on that day? A. Yes, sir; I do.

Q. And you had the cash box with you?

A. Yes, sir.

Q. And did it have a considerable amount of cash in it? A. Yes; it did.

Q. Do you know how much was in it?

A. No; I don't. It was around \$15,000 at the time, though [19] I don't remember exactly, because there were some in the office and some in the cash box, but the majority was, because that was the day, you see, they paid their balance of their tickets.

Q. Up to that time, up until the time that you

(Testimony of Robert Lee Farquhar.)

returned to the office on Wednesday, and what time of day was that? A. On Wednesday?

Q. Yes.

A. Well, it was probably between two and three, or two and four. I am not sure of the time.

Q. And up to that time, had you made any accurate count of the monies you had collected?

A. No; I hadn't.

Q. It had been your practice to turn over most of the money to Mr. Scott at the office and retain the rest for change, is that right?

A. Yes; as far as——

Q. Now, will you tell us exactly what happened as near as you can recall on Wednesday after you returned to the office, what you did with the cash box and with the money? [20]

A. Well, I can remember on Wednesday returning and I think—well, I remember definitely putting it in a canvas money bag most of the money, now; I don't know just how much there was, and giving it to Mr. Scott. Now, I still kept some in the cash box, more than I did on the previous days when I went to Treasure Island, and I went over to the counter, have a transportation counter in another building out there, and I think the reason at that time that we had more money was because of possible refunds.

Q. Did you sell more tickets there that day?

A. Yes; we did. I am not sure, but I am pretty sure we sold.

Q. Make refunds there, too?

A. I don't remember.

(Testimony of Robert Lee Farquhar.)

Q. You can't remember. But you do recall going to the counter with the cash box with some money in it? A. Oh, yes.

Q. But most of the money before that time had been placed in a canvas bag and delivered to Mr. Scott, is that right? A. Yes.

Q. Do you recall what was done with that money, the money that was in your cash box, and the money that was in the canvas bag on the night of November 25, or do you know? A. Well—— [21]

Q. That was Wednesday night.

A. Yes; I understand, now.

Q. Do you know of your own knowledge?

Mr. Davis: Don't want your understanding.

Q. (By Mr. Miller): Do you know of your own knowledge? What did you do with the money that night? Did you give it to Mr. Scott?

A. Yes; I gave it to Mr. Scott, and then the cash box, I think, I gave to Mrs. Keene, or Mr. Scott, one of the two.

Q. You returned the cash box either to Mr. Scott or Mrs. Keene, you don't remember which?

A. Yes.

Q. From there on, did you have any personal handling of that money that night?

A. No; I didn't.

Q. I refer now to Friday, November 27, that is the day after Thanksgiving. Do you recall what you did on that day?

A. Yes; I went to Parks Air Force Base. I

(Testimony of Robert Lee Farquhar.)

came in the office—I can't remember—I think it was between 9:00 and 10:00 Friday morning.

Q. And you went out to Parks Air Force Base?

A. Out to Parks Air Force Base.

Q. Did you collect any monies there? [22]

A. Not that I remember. I am not sure, but I don't think so.

Q. At what time did you return to the office that day?

A. It was around, between 4:00 and 5:00.

Q. In the afternoon? A. Yes.

Q. And when you returned to the office, what did you do?

A. Mrs. Keene, I remember, was working on the cash report, and I think both Mr. Scott and Mrs. Keene were—and I remember that Mr. Scott counted the cash, and the best of my recollection, it was about three, four, five hundred dollars off.

Q. When you say "off"—

A. Well, it was short, I think. I am not sure, but I think it was short, and so to double check it I counted it, the currency only.

Q. You counted the currency?

A. Yes; the bills.

Q. Do you remember how much currency there was in dollar amount?

A. No; I don't remember the exact amount, no.

Q. Do you remember approximately how much it was?

A. Well, it was in excess of \$15,000.

Q. The currency was in excess of \$15,000?

(Testimony of Robert Lee Farquhar.)

A. Yes. [23]

Q. But you don't recall the exact amount?

A. No; I don't.

Q. Did you make a memorandum at that time as to the amount? A. Yes; I did.

Q. Did you try to find that memorandum after I asked you to try to find it?

A. Yes. No; I couldn't find it.

Q. Could not find it?

A. I don't know who has that.

Q. Did you assist in the preparation of the cash report? A. No; I didn't.

Q. Who prepared the cash report?

A. Mrs. Keene.

Q. Now, when you were in the office on that Friday afternoon after returning from Parks Air Force Base, who else was there aside from you, Mrs. Keene and Mr. Scott?

A. I don't remember. As far as I know, that particular time there were only the three of us there.

Q. You are sure they were there, but you don't recall anyone else? A. I can't remember.

Q. And at that time did Mr. Scott ask you to count this money?

A. I think he did, yes. I am not sure of that, but he [24] must have; I counted it.

Q. Because you did count it? A. Yes.

Q. After the money was counted, what was done with it?

(Testimony of Robert Lee Farquhar.)

A. Well, I remember we counted—when it was first counted, we were in the inside office.

Q. Well, now, when you say the “inside office,” will you describe briefly the office layout?

A. Well——

Q. How many offices were there?

A. There are two offices, and there is a partition between the two. It's a glass paneled partition; you can see between the two offices, but what I call the outside office is the street office.

Q. That is where you would enter when you come in from the street?

A. Right. What I call the inside office is the office in toward the hangar, that opens up into the hangar.

Q. There is a door from that office into the hangar of what airline?

A. Well, they keep a lot of small airplanes in there. It isn't—I think United controls that.

Q. It is one of the hangars at the Oakland Airport? A. Right.

Q. Now, you then—you say you were in the inside office? [25] A. Yes.

Q. And what did you do with the money?

A. Well, as I remember, the money was placed in piles on the inside along the floor board, the bills, and I am not sure, but the change must have been in the change box, you know.

Q. You mean the money was placed on the floor and not on the desk?

(Testimony of Robert Lee Farquhar.)

A. Right. That was supposed to keep it out of sight so people from the street couldn't see it.

Q. Well, after this counting was finished, what was done with the money?

A. It was put in the cash box.

Q. Would you describe the cash box?

A. Well, it is about, oh (indicating), eighteen by fifteen, maybe; maybe three, four inches deep.

Q. Was it metal? A. Yes; it was metal.

Q. And it had a lock? A. Yes; it did.

Q. And did you have the key to it?

A. Yes; I did.

Q. Do you know if anyone else in the office had a key to it?

A. No; I don't know whether they had a key to it or not. [26]

Q. Do you know if there were any other keys to the cash box kept in the office?

A. Yes; there were.

Q. Where were those keys?

A. In the desk in the outside office.

Q. How many desks were there in the outside office? A. Two.

Q. How many desks in the inside office?

A. One.

Q. One. And who occupied or used the desk in the inside office as general matter?

A. Mr. Scott.

Q. Now, after the money was placed in the cash box, about what time of day was that when the counting was finally finished?

(Testimony of Robert Lee Farquhar.)

A. About 7:30, I think; between 7:00 and 8:00 in the evening.

Q. And at that time who was there in the office with you? A. Mr. Scott.

Q. When did Mrs. Keene leave?

A. About 7:00 o'clock.

Q. So that she wasn't there when the cash was finally put back in the cash box?

A. No; she wasn't. [27]

Q. What was done with the cash box?

A. It was locked in Mr. Scott's middle right-hand drawer.

Q. Of his desk? A. Of his desk, yes.

Q. And who had the key to that desk?

A. Mr. Scott.

Q. Did you retain the key to the cash box?

A. Yes; I did.

Q. And who decided, or whose suggestion was it that the money be locked up in the desk?

A. That I can't remember who suggested that.

Q. Did you have any discussion or conversation with Mr. Scott at that time as to what should be done with this money? A. Yes, sir.

Q. And do you recall what the substance of that conversation was, what he said and what you said?

A. Well, I can generally, yes. The safe at Transocean was discussed again.

Q. When you say "safe," safe at——

Mr. Davis: Transocean office at——

The Court: The safe at Transocean was discussed.

(Testimony of Robert Lee Farquhar.)

Q. (By Mr. Miller): Had you mentioned this safe at Transocean—is that Transocean Air Lines?

A. Yes; that is Transocean Air Lines. [28]

Q. Is their office close to IMATA office there?

A. It isn't far; I think maybe two or three hundred yards at the most.

Q. You think it is two or three hundred yards?

A. Yes.

Q. And had you previously had, at any time previously had money been deposited in that safe?

A. Well, now, I wasn't sure whether Transocean——

Q. You don't know whether they had?

A. Well, I knew they deposited in a Transocean safe on—well, Wednesday night.

Q. But you didn't make that deposit?

A. No; I had heard.

Q. Mr. Farquhar, to clarify, perhaps, was the handling of this cash and the safekeeping of it part of your duties?

A. No, sir. Well, handling the cash was.

Q. That is when you received it? A. Yes.

Q. When you turned it into the office, your duty was not the safekeeping of the money thereafter, is that right? A. No, sir.

Q. You turned it over to your superior, Mr. Scott? A. Yes, sir.

Q. Now, coming back to the conversation, about 7:30 on Friday night, November 27, you recall that you had a [29] conversation with Mr. Scott about what to do with this money overnight?

(Testimony of Robert Lee Farquhar.)

A. Yes; I did.

Q. And were there alternatives suggested as to what to do with it? A. Yes, sir.

Q. And did you make any suggestions?

A. Yes, sir; I suggested the safe in the gas station which is right across the street.

Q. Is that a large gas station?

A. Yes; it is.

Q. And what oil company, if you know?

A. Shell.

Q. Do you know if it is owned by the oil company or is it a privately-owned station?

A. Privately-owned station, I am quite sure.

Q. You know they had a safe? A. Yes, sir.

Q. What other suggestions did you make?

A. Transocean, Transocean safe.

Q. Yes. And did Mr. Scott make any comments or suggestions as to handling of the money?

A. Well——

Q. At that time?

A. He suggested that he could take it home with him, that [30] he had a rather vicious dog at home, quite sure nobody would get near the house.

Q. What was finally done with the cash box?

A. It was placed in the drawer and the drawer was locked.

Q. And then did you and Mr. Scott leave the office? A. Yes; we did.

Q. And prior to leaving, were all doors and windows of the office securely fastened?

A. Well, it was subsequently found out they

(Testimony of Robert Lee Farquhar.)

weren't. At the time, the doors were checked, to the best of my knowledge. I can't remember, but we were in the habit of always checking the back door and front door, but——

Q. The nearest you know, those doors were locked when you left? A. Yes.

Q. When you say subsequently you found that it was not securely fastened, what do you mean?

A. Well, not the doors, but one of the windows was open.

Q. Was the window open or simply unfastened?

A. Unfastened.

Q. And when did you discover that?

A. That was discovered the following day.

Q. On Saturday? A. Saturday.

Q. Was there any evidence that you could observe, anyone [31] had entered by that window?

A. No; as I understand——

Q. No; just did you observe any evidence anybody entered? A. No.

Q. About what time was it when you and Mr. Scott left the office?

A. Oh, it must have been between 7:30 and 8:00.

Q. And as near as you know, both doors were securely locked? A. Yes.

Q. Were the lights left on or turned off?

A. They were left on.

Q. The lights were left on?

A. I am quite sure.

Q. Was it the usual practice to leave the lights on in the office at night? A. Yes.

(Testimony of Robert Lee Farquhar.)

Q. Was there a janitor employed by the company to do the janitor work?

A. Yes; there was.

Q. And was he employed full time or part time?

A. Well, full time. He comes in once a day.

Q. I mean—— A. Well——

Q. He came in every day?

A. Every day, yes. [32]

Q. But he didn't spend his full time there?

A. Oh, no; no.

Q. He just came in to do the janitor work?

A. Yes.

Q. What time would he usually come in, if you know?

A. He would come in any time between 5:00 and 7:00 in the morning. Now, I am not sure of that, either. I have seen him in there at 6:00 or 7:00 in the morning.

Q. He did his work in the morning, not at night?

A. Yes.

Q. Also used as a janitor by other offices at the airport? A. Yes.

Q. Do you recall his name?

A. Harold Pitts.

Q. He was employed to do the janitor work by the company? A. Yes; he is.

Q. When you left the office that night with Mr. Scott, where did you go?

A. To the airport bar.

Q. Did Mr. Scott go there with you?

A. Yes; he did.

(Testimony of Robert Lee Farquhar.)

Q. How long did you stay in the bar?

A. Well, I left at about a quarter of nine or ten to, and Mr. Scott left just prior to that, maybe five, ten, fifteen minutes. [33]

Q. He left just before you left? A. Yes.

Q. Shortly. Do you know where he went when he left you? A. No; I don't.

Q. When you left there, where did you go?

A. I went down to the Villa de la Paix.

Q. Where is that?

A. That is down at the foot of the freeway, the Oakland freeway, just as you come to Oakland.

Q. Did you return at any time that night? Did you return to the office of your employer at the airport? A. No, sir.

Q. You did not? A. No, sir.

Q. Now, when did you next go back to that office?

A. The following morning about 11:30.

Q. That was Saturday morning, the 28th?

A. Yes, sir.

Q. Where did you live at that time?

A. In Berkeley, 822 Santa Barbara Road, Berkeley.

Q. Had you plans, when you left on Friday night, had you planned to return to work on Saturday morning?

A. I don't think so. I don't think I had. I couldn't answer that.

Q. Do you recall why you went over on Saturday morning? [34]

(Testimony of Robert Lee Farquhar.)

A. Yes; because Mrs. Keene called me about 10:30 and told me to pick her up and take her to the bank.

Q. Where was she when she called you, did she say?
A. No; she didn't.

Q. Do you know where she was?

A. I think she was in the office.

Q. You thought so, but you don't know that?

A. No.

Q. You then went from your home in Berkeley to the airport, is that right?
A. Yes, sir.

Q. You got there about 11:30?
A. Yes, sir.

Q. And who was there when you arrived?

A. Mrs. Keene—whether Mr. Scott was there at the time or not or just up picking the mail—but he was there right after. Whether he was there at the time, I can't remember, but, as I understand, he was at the airport.

Q. In other words, you recall, though, either at the time you arrived or shortly thereafter, Mrs. Keene and Mr. Scott were there?

A. Mrs. Keene was definitely there, because she opened the door and told me about the bank being closed.

Q. Was there anyone else besides Mrs. Keene or Mr. Scott?

A. Mr. Held was there, but I can't remember whether he [35] came there after I did or whether he was there when I got there.

Q. Now, will you tell us what happened after

(Testimony of Robert Lee Farquhar.)

you got there at 11:30 that morning, as near as you can recall?

A. Well, as near as I can recall, they were working on the cash report.

Q. When you say "they" were, who do you mean?

A. Well, Mrs. Keene, and I can't remember whether Mr. Scott was at the time or not.

Q. Mrs. Keene was working on the cash report?

A. Yes.

Q. And this was, oh, about 11:30?

A. Quarter of twelve. And at 12:30, or approximately 12:30 it was decided to count the cash again, and Mr. Scott gave me the key to his desk and Mr. Held at the time was working at Mr. Scott's desk, or he was in the back office, and I remember I had trouble with Mr. Scott's key. Then Mr. Held helped me. You have to open the center drawer before you can pull out the side drawers.

Q. And the cash box was in the side drawer?

A. Side drawer, yes. So then we got the cash box out of there. As I remember, both of us walked into the other room. I unlocked the cash box.

Q. Was the cash box locked when you took it out of the desk? [36]

A. Yes, it was.

Q. And you unlocked it?

A. Yes.

Q. Yes. Then what happened?

A. Well, it was discovered that the——

Q. When you unlocked it, did you look in it?

A. Oh, yes.

Q. Did you see anything missing from it?

(Testimony of Robert Lee Farquhar.)

A. Yes; I did.

Q. What was missing? A. The currency.

Q. All the currency? A. Yes.

Q. Well, was there anything left in the box?

A. Coin and checks, postal money orders, checks.

Q. And coin? A. And coin.

Q. All currency was gone from the cash box?

A. Yes, sir.

Q. When you discovered that, I understand Mrs. Keene was in the room, Mr. Scott was in the room, and Mr. Held was in the room? A. Yes, sir.

Q. What did you say when you saw this money missing?

A. I can't remember. I remember it was a shock and I [37] remember what I was thinking, but I can't remember. I know I said something; it was something pertaining to Mr. Scott. I thought he had taken it home with him, you see.

Q. And you recall Mr. Scott saying anything?

A. Well, not now. He said something, but said something, "You're joking, you're kidding," or something along those lines.

Q. Yes. A. But——

Q. And then who reported the loss, do you know? A. Mr. Scott.

Q. Yes. Do you remember approximately how many employees there were employed at or in connection with the Oakland office of IMATA at that time, in November of 1953?

A. Yes, sir. Full-time employees?

Q. Yes; full-time employees.

(Testimony of Robert Lee Farquhar.)

A. There were seven, if I remember correctly; seven.

Q. During this week while this operation was going on, when this fifteen, over fifteen thousand dollars was collected, how many part-time employees were there?

A. I think there were just one.

Q. Just one part-time employee? A. Yes.

Q. Can you remember the names of the employees that were employed at that time? [38]

A. Yes, sir. I think Miss Harris at Monterey, and a Miss Ferris, at Treasure Island, and a Miss Caldwell at Parks, a Mr. Held——

Mr. Davis: Go a little slower, please.

The Witness: Yes.

A. (Continuing): As a matter of fact, to correct that, I think now, I think there were eight employees. I will name them off.

Mr. Davis: Miss Harris at Monterey?

The Witness: Yes.

Mr. Davis: The next one?

The Witness: Ferris, at Treasure Island.

Mr. Davis: What is the next?

The Witness: Caldwell, Miss Caldwell.

Mr. Davis: Where?

The Witness: At Parks Air Force Base.

Mr. Davis: Yes.

The Witness: Mr. John Maxwell, he was at San Diego. I think he came up the next day.

Mr. Davis: By next day, you mean Sunday?

(Testimony of Robert Lee Farquhar.)

The Witness: Sunday or—no; it could have been Saturday; I don't remember.

Mr. Davis: I mean, it was after you discovered the shortage?

The Witness: Yes. [39]

Q. (By Mr. Miller): Now, of these employees you mentioned one, for instance, at Monterey. Did she report into the Oakland office?

A. She was responsible to the Oakland office.

Q. But did she come to that office frequently?

A. No, she didn't; she came up once for a sales meeting.

Q. She wasn't in that office at any time during this, we will say, on Friday, November 27, or Saturday—

A. No, sir.

Q. —November 28? A. No, sir.

Q. Were there other of those employees who would not have been in that office during that week?

A. I don't think Miss Caldwell was.

Q. But the others would have been there at some time during the week?

A. Yes; I think so, except for Mr. Maxwell.

Q. And would all those employees have known, we will say, with the possible exception of Miss Caldwell and Miss Harris, would they have known a large amount of cash was collected and kept in that office, and could they have known?

A. They could have, yes.

Q. They could have known that? A. Yes.

Q. Do you recall any time before this week dur-

(Testimony of Robert Lee Farquhar.)

ing the [40] operations where large amounts of cash were kept in that office over night?

A. Before this particular week?

Q. Yes.

A. No, I don't. I had only been with IMATA, say, for just about a month, you see, a little less than a month.

Q. And you never had occasion to make bank deposits up to that time?

A. I don't remember, but I don't think so.

Mr. Miller: Your witness, Counsel.

Cross-Examination

By Mr. Davis:

Q. You were speaking of employees, you gave the names of four, Miss Harris, Miss Ferris, Miss Caldwell, and Maxwell. Those were in addition to the four that you have been mentioning, being yourself and Mrs. Keene and Mr. Held, Mr. Scott?

A. Yes, sir.

Q. Now, you said there was one temporary employee; who was that?

A. Yes, sir; that was my brother. He had been in the business before and he knew it and, as I remember that particular day, we were very busy and we needed him at Parks Air Force Base.

Q. What day was that, day of the week? [41]

A. 25th, November 25th.

Q. On the 25th, that is the first time he had worked for the company?

A. I don't remember. I think he worked—he

(Testimony of Robert Lee Farquhar.)

had worked a couple of times for us, but I don't know whether it is before or after that.

Q. The 25th, as I understand it, that was the Wednesday before Thanksgiving? A. Yes.

Q. Your brother had worked one day, is that it?

A. Yes, sir.

Q. At Parks Air Force? A. Yes.

Q. But you know whether he was in the office at the Oakland—in your office at Oakland that day at all? A. No; I don't think he was.

Q. Yes. He didn't have a key to the office?

A. No, sir.

Q. Now, were any of these four you have mentioned, Miss Harris, Miss Ferris, Miss Caldwell or John Maxwell in the office at any time between the morning of the 25th and noon of the 28th?

A. I think the only one that could have been——

Q. I want to know whether you know. You would have known—were you there all the [42] time?

A. From the 25th through the 28th, no, I wasn't there.

Q. You do not know whether any of them were in the office during that period of time?

A. No.

Q. Their employment did not pertain to doing any work in or about the office, did it?

A. No. There were exceptions when we would check in there occasionally, but——

Q. But do you know during that period of time?

A. Well, from Monday, the 23rd, or the 24th,

(Testimony of Robert Lee Farquhar.)

I think Miss Ferris was over there helping to write up tickets, had a lot of tickets.

Q. During those two days——

A. From Treasure Island, yes, sir.

Q. From Treasure Island?

A. That was her office over there, you see.

Q. She was at Treasure Island, as I understand you to say, on the 25th? A. Yes.

Q. Which was Wednesday? A. Yes.

Q. The 26th was a Thursday? A. Yes.

Q. And on Friday—you say she was there on the 26th?

A. You say she was there on the 26th? That was Thanksgiving. [43]

Q. The office was closed then? A. Yes.

Q. And on Friday, the 27th, was she at Treasure Island that day? A. Yes, sir.

Q. Do you know where her home was?

A. Yes, I do. It's on Sacramento Street, in Berkeley.

Q. In Berkeley? A. Yes.

Q. So that when she left Treasure Island, she would have no occasion to go in the vicinity of the office at the Oakland Airport? A. No, sir.

Q. No. Now, you said that Mrs. Keene phoned you on Friday morning—or Saturday morning, and asked you to pick her up to take the money to the bank, is that right? A. Yes, sir.

Q. Yes. As far as you knew, she phoned you from the office, is that it? A. Yes, sir.

Q. Yes. And when you came there you found

(Testimony of Robert Lee Farquhar.)

that she and, as you recall, Mr. Scott were actually rechecking the cash sheets?

A. As far as I recall, yes. I am not sure.

Q. I see. Now, I believe you said that there were keys [44] to the cash box in the desks in the outer office?

A. Yes, sir.

Q. Yes. Who ordinarily occupied those desks?

A. Well, I did, Mr. Held, and Mr. Maxwell, we just used alternately, we used the desk when we needed it, that particular desk.

Q. That was a spare desk? A. Yes.

Q. For whoever happened to be in?

A. Yes.

Q. And the other desk was occupied by whom?

A. In that front office? Mrs. Keene.

Q. Yes. Was there ever any occasion when you personally locked those doors, front or back?

A. Yes, sir.

Q. How often had that occurred?

A. Well, I couldn't say how often, but it occurred frequently.

Q. Yes. On this evening that you speak about, on the evening of the 27th, Friday evening, do you remember whether it was you or Mr. Scott that locked the doors as you went out?

A. I don't remember, sir.

Q. You don't remember who locked them?

A. No. [45]

Q. You didn't—you don't recall personally examining them to see that they were locked?

(Testimony of Robert Lee Farquhar.)

A. I don't recall, but we shake it, have a habit of shaking the door to make sure it is latched.

Q. Did you personally look at the windows to see if they were fastened? A. No, sir.

Q. I believe you said, as a matter of fact, that on the next morning it was found that one of the windows in the rear or in the back room was unfastened? A. Yes, sir.

Q. Yes. Do you know what kind of lock was on the front door?

A. No; I don't know the name of it, the particular type you insert the key into the door knob. It isn't underneath the door knob.

Q. And did you have to use a key to lock it when you went out?

A. No, you don't, you just push the button on the inside in and it automatically locks.

Q. The button in the middle of the inside knob?

A. Yes, sir.

Q. Kind of a push button? A. Yes.

Q. And when you push that in and then close the door, it [46] automatically locks, is that it?

A. Yes, sir.

Q. Were you there at any time when the inspectors, or anyone of the police force was attempting to open that door without a key; were you present when anything like that occurred?

A. I can't remember. I remember there was some talk about it, but I can't remember.

Q. You don't remember whether you were in the office or not?

(Testimony of Robert Lee Farquhar.)

A. No; I remember there was some talk about it.

Q. Did you ever try to get into that office by the front door and found that by shaking the outside knob that you might open the door without a key?

A. I tried it once; I think it did happen once.

Q. That you had that occasion——

A. But I can't remember, but I did try once, I think.

Q. And it opened without using a key. You remember when that was?

Mr. Miller: Wait until he answers. I don't think—had you completed?

Q. (By Mr. Davis): Had you completed your answer?

A. No. I am trying to think whether it did or not, because occasionally we leave our keys at home. I think it was just a habit of shaking the door, trying to get in; whether [47] it happens or not—it doesn't ninety-nine out of a hundred times, but I can't remember.

Q. But you do recall once, as you remember, it did open without using a key?

A. No; I don't remember that it opened that time. I remember shaking it and trying to get in. I can also remember having to break a window once to get in that way.

Q. Well, awhile ago you said you did remember once that opened that way.

The Court: I don't think so. He said he tried it once.

(Testimony of Robert Lee Farquhar.)

The Witness: I tried, yes. I don't remember—I am quite sure it didn't.

Q. (By Mr. Davis): I see. And had you heard any of the employees there make a remark it could be opened that way? A. No—oh, how?

Q. By shaking the outside lock.

A. Oh, no; not that; no.

Q. You hadn't heard any remarks?

A. No, sir.

Q. Did you see anyone attempting to open this desk drawer of Mr. Scott's desk when the desk was locked, without the use of the key?

A. Yes, sir.

Q. And were they successful?

A. Yes, sir. [48]

Q. Will you explain to us how that happened?

A. Yes. As far as the details go, I don't know how it was done, but Mrs. Keene, she put her hand up underneath the right side of the desk facing it and evidently flipped some sort of a lever there, and the drawer would come open.

Q. They came open without the use of a key?

A. Yes, sir.

Q. Now, this tin box, or this cash box, I believe you called it, the box that was kept in the office there, or that was in the office on the night of this loss that occurred, was the same box that you had been using at Treasure Island, is that right?

A. Yes, sir.

Q. And do you know whether these other folks

(Testimony of Robert Lee Farquhar.)

that were at other locations were using similar boxes?

A. Well, I don't know about the Treasure Island, no. I think there were other boxes like that around the airport.

Q. I mean around this office, being sent out and brought back to this same office.

A. No; I don't know. You mean in our office?

Q. In your office; I am talking about your office.

A. Oh, I see. Yes; there would be, oh, occasionally turned in and sent to various installations.

Q. Well, was there——

The Court: No; he wants to know whether this was the [49] only box in use around the office?

The Witness: Oh, no; there were other boxes, yes.

Q. (By Mr. Davis): There were other boxes around the office? A. Yes.

Q. Were there any other of the cash boxes there on the morning of November 28, 1953, when this cash was found to be missing?

A. I don't remember, sir.

Q. Was this the only box that was in that particular drawer? A. Yes. Yes, sir.

Q. You don't know whether there were similar boxes in the office?

A. No; we usually had them in the installations; they bring them in occasionally.

Q. Yes, I see. I didn't hear where—you say when you left the office with Mr. Scott, where did you say you went?

(Testimony of Robert Lee Farquhar.)

A. On the evening of the 27th?

Q. On the—yes, on Friday evening.

A. The Villa de la Paix.

Q. I mean, you said first—I believe you said you and Mr. Scott went together.

A. Oh, to the airport bar.

Q. To the airport bar? [50] A. Yes.

Q. You arrived there about 8:45 p.m., is that it?

A. No.

Q. Left there about that time?

A. Left about that time, yes.

Q. Now, you are an employee and one of the employees that had a key to this door. I will ask you this one question: Did you take this money or any part of it? A. No, sir.

Q. Do you know who took it or any part of it?

A. No, sir.

Mr. Davis: I think that is all.

Mr. Miller: Just one question by way of clarification.

Redirect Examination

By Mr. Miller:

Q. You testified on cross-examination, Mr. Farquhar, that Mrs. Keene demonstrated how the desk could be opened without a key. When did that occur, before or after the loss of the money?

A. After.

Q. Do you remember approximately when was it—on Saturday when the loss was discovered?

A. Yes; it must have been Saturday afternoon.

(Testimony of Robert Lee Farquhar.)

Q. Yes. Was that before or after the police came? A. I don't remember.

Q. But it was definitely after the desk had been opened [51] and after this loss had been discovered?

A. Yes.

Q. And do you remember if anybody asked her to do it, or did she volunteer to do it?

A. I don't remember, sir.

Q. But you remember her reaching down and turning this gadget and opening the desk?

A. Yes, sir.

Q. At any time did you see Mrs. Keene demonstrate how other doors or locks could be opened in that office without keys?

A. I don't remember her demonstrating, no. I remember a discussion on it, though.

Q. Do you remember her at any time saying she could open the door without a key?

A. Yes, sir. She didn't say she could, herself; I think a friend of hers once did, though.

Q. She said a friend of hers opened it without a key? A. Yes, sir.

Q. Was that before or after this loss?

A. It was after.

Q. Yes.

Mr. Miller: No further questions.

Mr. Davis: No further questions.

The Court: We will take a brief recess. [52]

(Brief recess.)

Mr. Miller: Do you have any further questions of Mr. Farquhar, Mr. Davis?

Mr. Davis: No.

Mr. Miller: Mrs. Keene.

EVELYN KEENE

was called as a witness on behalf of the Plaintiffs, having been duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Evelyn Keene.

Direct Examination

By Mr. Miller:

Q. Are you employed at the present time, Mrs. Keene? A. Yes, I am.

Q. Who is your employer?

A. The Air Coach Transport Association.

Q. Were you previously employed——

Mr. Davis: I couldn't hear very well.

Mr. Miller: Why not move over there?

Mr. Davis: I didn't hear.

The Witness: I am now employed by the Air Coach Transport Association.

Mr. Davis: Air Coach? [53]

Q. (By Mr. Miller): Were you previously employed by Independent Military Air Transport Association? A. Yes, sir.

Q. How long did you work for them?

A. I don't know, but approximately two and a half, maybe three years.

Q. Were you employed by Independent Military

(Testimony of Evelyn Keene.)

Air Transport Association during the month of November, 1953? A. Yes, sir.

Q. And at that time what were your principal duties?

A. I was Mr. Scott's immediate assistant, secretary and sort of a "Girl Friday."

Q. Yes. You did bookkeeping or accounting work?

A. That was very limited, because we were not in common carriage. We had just got into common carriage. In fact, this move in question was our first major move.

Q. Did you prepare the cash report with respect to this operation? A. Yes, sir.

Q. Called the major move? A. Yes, sir.

Q. I will show you a document that is marked Plaintiffs' Exhibit 1 for Identification and ask you if that is the cash report which you, yourself, prepared? A. Yes, sir. [54]

Q. And that was prepared during the week ending November 28, 1953, isn't that right?

A. That is right, sir.

Q. I call your attention particularly to Page 7 of that report where there is an item marked, "Total loss." A. Yes, sir.

Q. \$15,554.86, and ask you if that is the figure that you arrived at as the amount that was lost from the office at that time?

A. No, sir; it isn't the figure that I personally arrived at. I was working with Mr. Tyrell, who is the—I don't know whether he is an employee of

(Testimony of Evelyn Keene.)

IMATA—and together, after numerous interruptions, he came up with this figure and had me write it on this cash report.

Q. Yes. Do you know, then, when you testified this is your cash report, were all the entries on that report made by you? A. Yes, sir.

Q. And that this figure of \$15,000 was arrived at after your working with Mr. Tyrell, was it before or after—that was after the loss?

A. That's right, Mr. Miller.

Q So that you are not sure that figure is exactly right, is that right?

A. Not exactly right. [55]

Q. Would you say it was right within a few dollars? A. I would say so, sir, yes.

Q. You would say that the loss then would be—that the loss from this theft or disappearance of the money would have been, say, not less than \$15,000?

A. That's right, sir.

Q. And we will say, then, not more than \$15,700?

A. That's right, sir.

Q. So that within those ranges that is a correct amount? A. I would say so.

Q. You are not sure that that exact amount is a correct figure, but it would be in excess of \$15,000?

A. That is right, Mr. Miller.

Mr. Miller: I am going to ask, your Honor, this be admitted in evidence. Any objection, Counsel?

Mr. Davis: I have no objection.

The Clerk: Plaintiffs' Exhibit 1 admitted into Evidence.

(Testimony of Evelyn Keene.)

(Whereupon cash report referred to above, previously marked for identification only, was received into Evidence as Plaintiffs' Exhibit No. 1.)

Q. (By Mr. Miller): I want to call your attention, Mrs. Keene, to the week ending November 28, 1953, and particularly to Wednesday of that week. That's the day before Thanksgiving, which would have been November 25. Do [56] you remember that day? A. Yes, sir

Q. Do you remember if you were working at the Independent Military Air Transport Association office on that day? A. Yes, sir; I was.

Q. Calling your attention particularly to the afternoon of that day, do you remember Mr. Farquhar, who testified here this morning, returning to the office with a cash box?

A. I don't remember that too clearly, sir.

Q. Do you remember, however, that on that day you had a considerable amount of cash in that office, is that right? A. That's right, sir.

Q. And was Mr. Scott there that day?

A. Yes, sir.

Q. And do you recall what was done with the money and checks and cash, coins that you had in that office that day? What was done with it at the close of business that day, Wednesday, before Thanksgiving?

A. Yes, sir; at the close of the day the money was taken and put in Transocean's office safe.

(Testimony of Evelyn Keene.)

Q. It was put in Transocean's office safe?

A. That's right, sir.

Q. And who took it to Transocean's office that day? A. I did, sir.

Q. You did. And under whose instructions did you take it [57] to the office of Transocean and put it in their safe? A. Mr. Scott.

Q. Had you, prior to that time, received any specific instructions from the Washington office of IMATA, or from anyone else in IMATA as to how the cash should be handled and what should be done with it?

A. As I recall, sir, Mr. Scott talked with Mr. Roach on the phone. Mr. Scott may or may not have told me what his conversation was. Right now, I don't recall.

Q. But you didn't talk to Mr. Roach on the phone?

A. But I, myself, didn't talk to Mr. Roach.

Q. Did you talk over the instructions he might have given to Mr. Scott, is that right?

A. That is right.

Q. Did Mr. Scott at any time tell you what his instructions were? A. I believe he did, sir.

Q. What were they?

A. I don't remember.

Q. You don't remember? A. No, sir.

Q. But you do know on this Wednesday you discussed the money which was at that time somewhere in the neighborhood of \$15,000?

A. That's right, sir. [58]

(Testimony of Evelyn Keene.)

Q. And would that have been \$15,000 in currency?

A. There should have been somewhere around here a receipt for the amount that was put in the Transocean's safe, because Mr. Herman, who was manager of the Transocean restaurant, gave me a receipt for the amount of money he put in his safe.

Q. Yes, but you don't remember the exact amount?

A. But I don't remember the exact amount.

Q. But it would have been, as you recall it, in excess of \$15,000?

A. It may or may not have been, sir. I don't recall, because I don't recall how much the—whether or not the checks were in that or whether it was just the cash.

Q. And you took this money to Transocean, and prior to taking it to Transocean, had you been instructed by Mr. Scott to do anything else with it?

A. Yes, sir; we were going to take it to Western Union and wire it to Washington, D. C. And so we put the money in a canvas bank satchel. Mr. Scott sent me through the hangar to the Western Union Office, which is in the main terminal building. [59]

Q. I don't want to interrupt you, but approximately what time of day was that?

A. I would say it was in the early evening.

Q. After the banks had closed?

A. Yes, sir. Shall I continue?

Q. Go on with just what you did.

A. I went through the hangar, Hangar 1, which

(Testimony of Evelyn Keene.)

is a private hangar, and across a portion of the field there, the driveway portion of the field, and through United Freight section to the Western Union office, and Mr. Scott walked along the sidewalk and out the front and met me at the Western Union office. I was standing out in front of the window and he called me to come back into the Western Union office, which I did.

And he said, "Will you take care of this money?"

And I said, "All right, sir, I will."

And then the young lady there gave me the cost of wiring this money to Washington, D. C.

Well, I can't recall exactly how much it cost to wire the money, but I was always—this was such a frugal company and gave us such limited monies to work with, that I thought, well, that maybe they would be a little unhappy if I spent all this money to wire the money back east, I'd better consult with Mr. Scott again and ask him if he would like me to do it.

Q. Do you recall approximately how much that was, would it have been \$46.00? [60]

A. Somewhere in that area, sir; maybe \$10 more.

Q. It was in the neighborhood of \$50, the cost for wiring it? A. That's right.

Q. You thought that would be too much and wanted to again discuss it with Mr. Scott?

A. That's right.

Q. Where did you go to see Mr. Scott then?

A. Mr. Scott was sitting in the cocktail lounge, the TALOA bar, and the girl in the Western Union

(Testimony of Evelyn Keene.)

office gave me a manila envelope to put this sack in and I talked to Mr. Scott there.

Q. You took it into the bar?

A. Yes, into the cocktail lounge, not into the bar proper.

Q. Cocktail lounge?

A. Yes, and Mr. Scott said, "Well, what we will do is ask Mr. Franz Herman if we can use his office safe." I don't know whether he discussed the office safe or the restaurant safe?

Q. Who is Franz?

A. Franz Herman is the manager for the Trans-ocean Restaurant and Bar.

Q. Manager of that restaurant? A. Yes.

Q. And so then what did you?

A. So I found Mr. Herman and asked him if we may do it, and [61] he said yes, and with that he came with me over to the office, I gave him the money and he gave me a receipt for the amount, and it stayed there that night.

Q. You saw it put in the safe? A. No.

Q. The safe was closed, you received a receipt from Mr. Herman?

A. Yes. At that time Mr. Herman told me, "We will put it in the office safe and not in the restaurant safe, because too many people have the combination to the restaurant safe."

Q. Did he tell you how many people had the combination to the Transocean office safe?

A. I am not sure, sir; I think he said two people, he and Amie, his assistant.

(Testimony of Evelyn Keene.)

Q. Now, on Friday, the next day after this Wednesday—the next day after this Wednesday was Thanksgiving, and you were not in the office that day?

A. That is right, sir.

Q. The money remained in the safe, as far as you know, over Thanksgiving, is that right?

A. That's right, sir.

Q. Now, when was the money taken out of the safe?

A. Well, let's see. I came to work Friday morning, sometime, sir, I can't tell you.

Q. You don't remember the exact time? [62]

A. No.

Q. Friday morning, the 27th?

A. Right, sir.

Q. Did you go to the safe and get the money out?

A. No, I went to the office and found Mr. Herman, and then we both went over and he took the money out of the safe.

Q. You went and got Mr. Herman and went to the safe and he turned the money over to you, and then you took it back IMATA's office?

A. That is right, I received it.

Q. As you recall, what was your job, or what were your duties on that Friday?

A. Well, the foremost thought in all minds, of course, was write up the last week's cash report. It is repetitious and not a difficult thing to do, it is just long, and Mr. Scott came in early that morning,

(Testimony of Evelyn Keene.)

as I recall; we have a spare desk in this front office and Mr. Scott had the auditor's coupons for these tickets, and we were checking them off the cash report as I was writing them up.

Q. And that is the day you prepared this document I have identified here?

A. Yes, sir; started that time.

Q. Started; you finished it afterwards?

A. Yes.

Q. But that was the day you were working on that. Did you [63] at any time that day count the money? A. No, sir.

Q. Do you know who counted the money?

A. Well, yes, I do. Mr. Scott and Mr. Farquhar counted the money, because I know Mr. Farquhar's writing and he had a page from the legal tablet and on there he had how many 20's he had counted, and how many 10's and so forth. I know they didn't have very many large bills, there were numerous 20's, and also some tapes around, and we knew approximately what the figure was.

Q. And would you say that figure was approximately fifteen thousand dollars?

A. Yes, sir; It was definitely.

Q. Within a few dollars of the correct amount, was that right? A. Yes, sir.

Q. Might be \$15,500 or seven hundred—

A. I saw the tapes; approximately.

Q. The amount of currency would have been something in excess of \$15,000?

A. That is right, Mr. Miller.

(Testimony of Evelyn Keene.)

Q. Why, if you know, why was the money kept in the office all that day and not deposited in the bank? Now, that was a Friday, the banks were then staying open until six o'clock, isn't that right? [64]

A. May be right, but I don't know the banks were open until six o'clock. As a matter of fact, I thought they were open on Saturday mornings. I rarely go to the bank.

Q. You rarely go to the bank?

A. That is right.

Q. You rarely made any deposits in the bank for IMATA?

A. I made a few, but I would always have Mr. Maxwell or somebody drive me. My personal banking I take care of by mail.

The Court: Mr. Miller, would you go down there? The witness talks to you and I can't hear.

The Witness: I am sorry.

Q. (By Mr. Miller): Now, you would make deposits in the bank for IMATA from time to time, is that right? A. Yes, sir.

Q. What bank office did you take the money to?

A. I took it to Alameda, sir, because it was the closest to the Oakland Airport.

Q. The Alameda office was the closest?

A. Bank of America, yes.

Q. About how far is that from the airport?

A. I don't know how far, be about a fifteen minute drive.

Q. But on this Friday, the money was not taken to the bank, is that right? A. No, sir. [65]

(Testimony of Evelyn Keene.)

Q. And what time did you leave the office on Friday?

A. Approximately seven o'clock. Seven p.m.

Q. And who was there when you left?

A. Mr. Scott and Mr. Farquhar, they were in the process of counting.

Q. They were still in the process of counting money, is that right? A. Yes.

Q. When did you next return to the office?

A. Saturday morning to complete my cash report and make the deposit.

Q. And about what time did you arrive there on Saturday morning?

A. Oh, somewhere, I suppose, between eight and eight-thirty. I know it had to be early.

Q. And when you went to the office that morning, was the door locked? A. Yes, sir.

Q. When you went in did you observe any open windows? A. No, sir, I didn't.

Q. Did you observe any open doors? Was the back door fastened?

A. Yes, the back door was fastened.

Q. Did you look at Mr. Scott's desk in the office at that time when you first went in? [66]

A. Well, yes, sir, I always go empty the ash trays in case the porter didn't do it.

Q. Did you see any signs at all——

Mr. Davis: I couldn't hear the witness.

The Witness: I used to dust Mr. Scott's desk every morning and straighten it out.

(Testimony of Evelyn Keene.)

Mr. Davis: The top of the desk?

The Witness: Yes, sir.

Mr. Davis: Didn't try the drawers?

The Witness: No, sir.

Q. (By Mr. Miller): Did you observe any signs at all that there had been anyone who had opened the desk and left the desk open, or anything like that, the night before? A. No, sir.

Q. No signs of entry, forceable or otherwise?

A. No, sir.

Q. What time did Mr. Scott arrive there that morning?

A. Shortly after I did, because I hadn't started, I hadn't gotten into my work when Mr. Scott came.

Q. Was there anyone else there that morning?

A. No, not for awhile. I understand Mr. Held was there, but I don't remember when he came in or what I was doing when he got there.

Q. Do you remember Mr. Farquhar coming that morning?

A. Yes, sir; I called him from the Oakland office. [67]

Q. About what time did you call him?

A. I imagine around ten, ten-thirty, something like that.

Q. And what was the reason for calling him?

A. I wanted an escort to the bank.

Q. You knew he lived in Berkely, didn't you?

A. Yes, sir.

Q. That is a considerable distance from the Oakland Airport? A. Right.

(Testimony of Evelyn Keene.)

Q. And Mr. Scott was there with you. Why didn't Mr. Scott act as the escort to the bank?

A. Well, I can't answer that, sir; I don't know.

Q. Did Mr. Scott ask you to call Mr. Farquhar and ask him to come over?

A. I don't know whether he did or whether I suggested it, or whether I said I'd better call Bob and get him out here.

Q. While you and Mr. Scott were in that office Saturday morning, did Mr. Scott ask you to go and see if the cash box was in his desk?

A. Yes, sir; he did.

Q. Did he hand you the key to his desk and ask you to go in and open the desk? A. Yes, sir.

Q. And did you do that?

A. Mr. Scott handed me the keys to his desk, said, "Mike, will you please check and see if the cash box is still in the [68] desk."

I went to the desk, looked at the box, locked it and returned the keys.

Q. You didn't take that cash box out of the desk? A. No, sir.

Q. Didn't you think that was an unusual request for him to make?

Mr. Davis: Object to that as calling for an opinion.

The Court: Sustained.

Mr. Miller: Withdraw the question.

Q. (By Mr. Miller): Had there been other occasions when Mr. Scott directed you to go and see if there was something in his desk?

(Testimony of Evelyn Keene.)

A. Yes, sir.

Q. What were those occasions, if you recall?

A. Oh, sometimes a person—I can't recall, but I do recall Mr. Scott used to give me the keys to his desk.

Q. When he was right in the office with you?

A. I don't recall, sir.

Q. You don't recall any other occasions like this one?

A. No, sir.

Q. Now, what time did Mr. Farquhar arrive?

A. I should say around eleven-thirty.

Q. After Mr. Farquhar arrived, was the desk opened and the cash box taken out? [69]

A. I don't quite understand, Mr. Miller.

Q. I mean—what I am getting at, who took the cash box out of the desk?

A. Mr. Farquhar.

Q. And at what time was that?

A. Shortly after he arrived.

Q. Yes. And do you recall if Mr. Scott asked him to do it?

A. No, I don't, sir.

Q. You don't recall. You know that he took the cash box out of the desk?

A. That is right.

Q. And who was present in the office at that time?

A. Mr. Scott, Mr. Farquhar and Mr. Held and myself.

Q. Yourself. And where was the cash box opened up?

A. As I recall, there was some difficulty in opening the desk at the time, so Mr. Held went

(Testimony of Evelyn Keene.)

over to Mr. Farquhar and helped him open the desk. Then they both brought the cash box into the front office and Mr. Held—I mean Mr. Farquhar had the key to the cash box, so he opened it.

Q. Now do you remember, can you remember if he said anything when he opened that cash box and looked in it? A. Yes, sir, I can.

Q. What did he say?

A. "All right, Scotty, where is the money?"

Mr. Davis: What was that? [70]

The Witness: "All right, Scotty, where is the money?"

Mr. Davis: Yes.

Q. (By Mr. Miller): And where was Mr. Scott standing at that time, with regard to the desk?

A. Close by, sir.

Q. Was he facing Mr. Farquhar or standing to his back to him? A. That I don't know.

Q. Do you recall if Mr. Scott said anything in respect to this statement of Mr. Farquhar's?

A. I can recall quite well how Mr. Scott looked. He had just turned absolutely gray. He said, "It should be in there." And then—No, wait a minute. I can recall he said, "You are kidding."

And Mr. Scott just turned gray.

Q. Do you recall having demonstrated how the desk could be opened without a key?

A. Yes, sir, very well.

Q. What was the occasion for that?

A. Well, Mr. Scott always keeps his desk locked, and I always kept my desk locked, and at times I

(Testimony of Evelyn Keene.)

would want to put, for instance, some returned checks from the bank, his personal checks had fallen out of his desk, and I wanted to slide them through the desk in order to put them back in. I keep my desk locked; occasionally I have forgotten the keys to my [71] desk and couldn't get into it, almost had to break it open.

So when the money was missing, I couldn't imagine how anyone could get in the desk if it were locked. So I crawled under the desk and I saw this little hook, and I pressed it down with my finger, and the drawer opened.

Q. Did you know that you could do that before that time?

A. Well, no, sir; or I wouldn't have to break into my own desk.

Q. Was that before the police arrived?

A. Yes, sir.

Q. Do you recall any time when you or some friend of yours opened the front door of that office without a key?

A. Yes, sir.

Q. What was that occasion?

A. My father-in-law brought me to work—this was after the robbery, or loss, and I, I don't remember whether or not I had forgotten my keys, so I told him about the police being able to open the door with a plastic card.

Q. Let me——

A. He tried it and he opened it.

Q. You say the police opened the door with a plastic card?

A. Yes.

(Testimony of Evelyn Keene.)

Q. Did you see them do that?

A. No, I was in the office at the time. I didn't see them do it, but I can remember—I don't know whether he was uniformed [72] man or a plain-clothesman, he said at the time, "This door can be opened with a card."

The Court: With a what?

The Witness: A card.

The Court: A card?

The Witness: Card.

Mr. Miller: Card.

Q. (By Mr. Miller): Now, what did your father-in-law do; will you describe what he did?

A. I told him about it, and he said, "Well, I wonder if he can do that," so he opened the door with a plastic card.

Q. When you say "a plastic card," will you describe that to us?

A. I have one here, sir. It would be just like this, only made out of plastic, flexible plastic.

Mr. Davis: I wonder if I could see that.

Q. (By Mr. Miller): Will you hold it up?

A. Let's see if I have a plastic calendar card.

Q. But something like this?

Mr. Davis: Maybe we all have some of these.

Q. (By Mr. Miller): Something like this? It is a plastic calendar card; something like that. Did you try to open the door with a card like that? Were you able to do it?

(Testimony of Evelyn Keene.)

A. I wasn't successful, no.

Q. You were there when your father-in-law did it? [73]

A. Yes, sir.

Q. Slipping the card in the edge of the door?

A. Yes.

Q. This was after the—— A. robbery

Q. Robbery. Had you ever opened that door without a key before the robbery?

A. No, I tried. I had to break a window for some American fliers, not too long before that.

Q. To get in? A. To get in, yes.

The Court: I will have to ask you to go back, because as soon as you come up here, the witness talks to you.

Mr. Miller: I will get back here.

Mr. Davis: I wonder if that card could be marked as an exhibit.

The Court: All right.

The Clerk: Defendant's Exhibit A, marked for identification.

(Whereupon plastic card referred to and described above was marked Defendant's Exhibit A for identification only.)

Q. (By Mr. Miller): Now, you stated, Mrs. Keene, you called Mr. Farquhar to accompany you to the bank that morning. You recall why you didn't go to the bank, or did you go to the [74] bank?

(Testimony of Evelyn Keene.)

A. Time had gone by so quickly that, and we hadn't completed enough of our report to make a deposit, we could have made a partial deposit, but we didn't.

Q. That Saturday morning?

A. No, not that Saturday morning.

Q. I am talking about Saturday when you called Mr. Farquhar to come over to accompany you to the bank. Did you go to the bank? A. No.

Q. And why didn't you go to the bank?

A. I found out they were closed on Saturdays.

Q. Did you call the bank?

A. Yes, I called the Bank of America in Alameda.

Q. You asked them if they would take a deposit?

A. Yes, sir, I did.

Q. And what was their reply?

A. That their locks were secured for the week end and they could not, would not be responsible for a deposit.

The Court: Was this before you called Mr. Farquhar?

The Witness: No, sir, this was after I discovered the banks were closed. I wouldn't have called Mr. Farquhar if I had known the banks were closed on Saturday.

The Court: But when Mr. Farquhar came, the box was opened and the money wasn't there, was there any occasion for [75] calling the bank then? I don't understand the sequence.

(Testimony of Evelyn Keene.)

The Witness: Well, he is questioning me about——

The Court: He wants to know why you didn't put the money in the bank Saturday. You say you telephoned the bank and found the bank wouldn't accept a deposit. What I am trying to find out, when was that telephone call?

The Witness: Like to restate your question, please, Mr. Miller.

The Court: No, just answer my question. You just said you telephoned to the bank on Saturday morning, found that the bank wouldn't accept the deposit because they were not equipped for it. When did you make that telephone call to the bank on Saturday morning?

The Witness: When Mr. Farquhar was en route to the office.

The Court: While he was on the way down?

The Witness: That's right, sir.

The Court: All right.

Q. (By Mr. Miller): That was before you discovered the loss of the money?

A. That's right, sir.

The Court: All right.

Q. (By Mr. Miller): Was the Western Union office at the airport open that Saturday?

A. I don't know, sir; I didn't check.

Q. You didn't go to the Western Union [76] office?

A. No, sir.

Q. Was the Western Union office open on

(Testimony of Evelyn Keene.)

Friday? A. I believe it was, sir.

Q. Yes. And was that office ordinarily open at nights, the Western Union office?

A. Yes, sir; ordinarily is open at night.

Q. Usually stays open all night, is that right?

A. I don't know.

Q. But it would be open at eight o'clock at night?

A. Yes, sir, generally is, because the switch-board is there.

Q. Do you know why Mr. Held was at the office that morning, on Saturday morning?

A. No, sir, I don't recall why Mr. Held came in.
Mr. Miller: You may cross-examine.

Cross-Examination

By Mr. Davis:

Q. Mr. Miller asked you why you needed to call Mr. Held—who was it you called?

A. Mr. Farquhar.

Q. When Mr. Scott was there and why Mr. Scott couldn't have accompanied you to the bank, if Mr. Scott had accompanied you to the bank, would there have been anyone there left in charge of the office if you hadn't called Farquhar or Held?

A. Well, sir, it is just unlikely for me to ask my boss to take me to the bank, I guess. [77]

Q. I mean, was there anyone to take charge of the office if you and Mr. Scott had gone to the bank together?

(Testimony of Evelyn Keene.)

A. Well, we generally lock the office and turn the phones over to the answering service.

Q. You had an answering service?

A. That is right, sir.

Q. Had Mr. Scott ever accompanied you to the bank when you made a deposit?

A. No, sir, not that I recall. He may have, but not that I recall.

Q. Had Mr. Farquhar ever accompanied you before to the bank when you made a deposit?

A. I don't remember.

Q. As a matter of fact, up to this time, had you ever made any substantial deposits at any other time?

A. I had made some deposits, I don't remember the amount. Mr. Maxwell, who was IMATA's employee at that time, drove me to the bank and I had other people drive me to the bank.

Q. Mr. Maxwell was a former employee, was he?

A. He was an employee of IMATA at that time.

Q. He wasn't an employee at the time this loss occurred?

A. Yes, sir, he was, but he was down in San Diego.

Q. He hadn't been—he wasn't employed at this office, though?

A. That's right. [78]

Q. Now, I think you spoke of janitor's service. Do you recall the janitor, what arrangements there were for janitor service there during the time you were there?

A. Yes, sir, we had Harold Pitts, who is our

(Testimony of Evelyn Keene.)

janitor, and he used to come in in the early morning.

Q. And he would be there for what period of time each day, probably?

A. I don't know, sir. He tried to get his work done before I got there. Occasionally, upon my arrival at the Airport, I would find him just finishing up:

Q. Was he an independent janitor, or was he working for some janitorial service?

A. No, sir, I believe they are city jobs out there, but I am not sure. I don't know whether Mr. Pitts is employed by the City at the Airport and just hires out in his spare time, or just what his arrangement is.

Q. You don't know what the arrangement is?

A. That's right.

Q. Had you had any janitors work there prior to the time Mr. Pitts was employed, or took on that service?

A. Well, as I recall, Mr. Pitts used to work for another janitor who we contracted to do the work.

The Court: I think what he wants to know is while you were did, did you observe any other janitor aside from this Pitts come around and do the work [79]

A. I think, yes, Mr. Baker.

Q. (By Mr. Davis): Baker?

A. Paul Baker.

Q. Yes. And he wasn't any employee any longer during November, 1954, was he?

A. No, sir.

The Court: 1953.

(Testimony of Evelyn Keene.)

Mr. Davis: '53, pardon me.

The Witness: No.

Q. (By Mr. Davis): And had not been for some time? A. No.

Q. Would you say for more than two or three months? A. I don't remember, sir.

Q. Now, the janitor had a key to the office, did he not? A. Yes, sir.

Q. Yes. And Mr. Baker had had a key when he was employed there? A. Yes, sir.

Q. What other employees were there during the time you worked there who were no longer employed by the Company in November of 1952, or 1953?

A. That list you have now, Mr. Davis, is the peak of our employment.

Q. What I mean, those were the ones still there in November of 1953, but had you had any employees during the period of [80] time you were there—— A. No, sir.

Q. ——who were no longer working for the Company? A. No, sir.

Q. At that time. You don't recall that. So outside of this one Mr. Baker, the janitor, or extra janitor, that is the only one you know of who had a key to the office? A. That's right, sir.

Q. And was no longer employed by the Company, is that correct? A. That's right.

Q. Now, when you took the money to the restaurant and bar of this Airline company to put it in the safe, you said that the manager gave you a

(Testimony of Evelyn Keene.)

receipt. Did he receipt just for the package, or did he receipt for the certain number of dollars?

A. I don't recall, sir.

Q. He didn't count the money, did he?

A. No, sir.

Q. In your presence? A. No, sir.

Q. No. So as far as you know, he couldn't very well have given you a receipt for an exact number of dollars and cents?

A. No, sir, unless I told him how much was in the bag.

Q. That's right. And at that time, it was in a canvas bag, and how was that bag fastened? [81]

A. The canvas bag was in a manila envelope.

Q. I mean how was the bag itself fastened, tied with a string? A. I don't recall.

Q. Sealed with wax or anything?

A. No, it wasn't sealed.

Q. Wasn't sealed. And then in a manila envelope, and was that sealed?

A. I believe it was, sir.

Q. And when you got it back you think it was sealed, too? A. Yes.

Q. And that bag was, or I mean that bag or envelope, whatever you want to call it, with the money in it, was received back by you about what time on the morning of the 27th?

A. I don't recall.

Q. Was it just before noon?

A. Yes, sir.

Q. Was it before ten o'clock, you think?

(Testimony of Evelyn Keene.)

A. I don't recall, sir.

Q. I see. And after it was brought back to the office—Now, up to that time, you hadn't made any real accurate account of it, had you?

A. No, sir.

Q. You were only estimating?

A. That's right. [82]

Q. And then it was on Friday that you and—or Mr. Scott particularly, went through the detail of trying to find out exactly how much money was there?

A. No, Mr. Scott never tried to find out exactly how much money was there, Mr. Davis.

Q. Oh, I thought you said Mr. Scott was counting?

A. No, he was helping me with my cash report. By that, I mean these tickets have to be listed in numerical order, and to straighten them out and put them in order.

Q. Who was it that counted the money, actually counted it to see how much was there?

A. Mr. Farquhar and Mr. Scott.

Q. Mr. Farquhar and Mr. Scott. Well, had Mr. Scott made one or two counts before Mr. Farquhar came in, if you recall?

A. I recall he made a count by accounting, but it was in error.

Q. It didn't check out with the amount that your records showed ought to be there, is that it?

A. I don't believe I am in a position to answer

(Testimony of Evelyn Keene.)

that, because it was between Mr. Farquhar and Mr. Scott.

Q. I see. But anyway, that was your—I mean, that was the general idea, there was some occasion why they wanted to recount it?

A. Yes.

Q. To bring it out even with the total that you had compiled as the amount that ought to be [83] there?

A. That isn't—first trying to come to a total.

Q. What?

A. I never came to a total amount.

Q. You hadn't yet completed your records and didn't do that until the following Saturday, or sometime?

A. It was several days later when Mr. Tyrell came out from Washington, D. C.

Q. I see. So you hadn't yet, on Friday evening, you hadn't determined exactly how much money ought to be there?

A. No, sir.

Q. I get it.

Now, you were one of the employees at the time of this loss, and under the provisions of the Bond that was executed by the defendant, if there was—if this lost cash, or any part of it was by reason of any dishonesty on your part, then the bonding company is liable. So I will ask you: Did you personally take this money, or any part of it?

A. No, sir.

Q. Do you know who did?

A. No, sir.

Q. Do you know about what—how long after this

(Testimony of Evelyn Keene.)

loss occurred that your father-in-law attempted to open this door and did open it by the use of this plastic card?

A. No, sir.

Q. Was it a month, or a week, or a few days, or what? [84]

A. I can't answer that, Mr. Davis, because I don't remember when it was. I can just say just shortly afterwards.

Q. Shortly afterwards? A. Yes.

Q. Would it be——

A. Day or weeks, I wouldn't know.

Q. You think it would be before Christmas of that year?

A. I don't remember, Mr. Davis.

Q. I see.

A. I would venture to say, but I couldn't prove it.

Q. Had your father-in-law driven you to the office that morning?

A. No, sir, my husband took me to work in the morning.

Q. How did the father-in-law happen to be there, that is what I am getting at.

A. It was probably some Saturday morning, or something, that he did it, when my husband went to work and I had a couple of things to do, either to open and to check the mail, see if any checks arrived, or something.

Q. Where did you live at that time?

A. Alameda.

Q. In Alameda. And your husband worked in

(Testimony of Evelyn Keene.)

Oakland? A. That's right.

Q. In what place in Oakland?

A. H. C. Capwells. [85]

Q. That is a——

A. A department store.

Q. Near Broadway and Fourteenth, isn't it?

A. Twentieth and Broadway and—yes.

Q. Twentieth and Broadway, yes. Your husband had to be to work early on Saturday morning, as well as other days of the week?

A. That's right, sir.

Q. You did not need to be to work at this office on Saturdays as early as the other days, is that right?

A. I didn't have to work on Saturdays, as a general rule.

Q. I see. As a general rule; so on some mornings when your husband would go to work early, you had some little work to do, you would have your father-in-law take you later in the day?

A. That is right, Mr. Davis.

Q. That is the way your father-in-law happened to be driving you down that day?

A. It could very well have been, yes, sir.

Q. I see.

Now, I believe there was some evidence here that the cash box keys were in your desk, is that correct?

A. No, sir.

Q. Where were those keys?

A. As I understand it, they were in the spare desk. [86]

(Testimony of Evelyn Keene.)

Q. In the spare desk? I see. How many keys were there that would open this box, do you know?

A. I wouldn't know that, Mr. Davis.

Q. I see. Had you ever opened the box yourself?

A. I may have, I may not have. I don't remember.

Q. I see. How many of these cash boxes, as you recall, were kept in the office from time to time, brought in and sent out with a different salesman?

A. Of course, only two stay in my mind, one I had—no, that came afterwards. Only one that I know of.

Q. This was the only one they had around the office?

A. May not be, but that is the only one I know of right now.

Q. Yes. Could you describe the kind of key that was used to open that box?

A. Yes, they are gray metal, I suppose they are steel, and they are flat. They look like an inter-safe key.

Q. Just a flat—— A. Gray key.

Q. Not ribbed or corrugated?

A. No, sir, just cut out, stamped out.

Q. Just a few notches on the one side. I think that is all.

The Court: Is that all?

Mr. Miller: Just to clear up one point. [87]

(Testimony of Evelyn Keene.)

Redirect Examination

By Mr. Miller:

Q. Mrs. Keene, on Wednesday night when you took the money to the telegraph office and ascertained that it would cost, as you expressed it, a considerable amount, didn't you at that time tell the telegraph company how much there was?

A. Well, yes, I had to tell her how much it was in order for her to arrive at the cost.

Q. Yes. So that at that time the amount that you had had been counted, is that right?

A. The amount in the bag had been counted that we were going to send.

Q. Yes. So that when you answered Mr. Davis' question, about the amount, it hadn't been accurately counted, you didn't mean it hadn't accurately been counted up to Wednesday night, at least, is that right?

A. That is right.

Q. So that at that time you knew how much there was, and when you put it in Mr. Herman's safe at the airport, the Transocean safe, you knew how much there was because you had just come from the telegraph office?

A. Yes, that is right, sir, but I don't know how much it is now.

Q. No, but at that time you knew how much there was?

A. At that time. [88]

The Court: Is that all of this witness? Then we will take a recess until two o'clock.

(Whereupon an adjournment was taken until 2:00 o'clock p.m. this date.) [88A]

February 17, 1955, 2:00 P.M.

Mr. Davis: May it please the Court, I would like to recall Mrs. Keene for a couple more questions on cross-examination.

The Court: All right.

EVELYN KEENE

recalled as a witness on behalf of the plaintiff, being previously duly sworn, resumed the stand and testified as follows:

Further Recross-Examination

By Mr. Davis:

Q. Mrs. Keene, in response to my question as to the employees who had worked for Independent Military Air Transport Association during the time you were there and who were no longer with the Association in November of 1953, I believe that there was one whose name you didn't mention.

A. Yes, there was a Mr. Bill Drumm.

Q. How long had he worked there, do you know?

A. I don't know the term of his employment, maybe three or four months, something like that.

Q. And he left about what time?

A. Oh, probably in September.

Q. Of '53? [89] A. Yes, sir.

Q. Yes. At least not later than October, 1953.

A. At least not later.

Q. Did he have a key to the office during the time he was there? A. Yes, sir, he did.

(Testimony of Evelyn Keene.)

Q. And did he at any time while he was working there have any keys made, do you know?

A. Yes, Mr. Scott asked him to have some keys made.

Q. Some extra keys? A. Yes, uh-huh.

Q. Now, was there ever an occasion when you came to the office in the morning and found either the front or the back door unlocked?

A. Several times, sir.

Q. And did you ever speak to anyone about that?

A. Yes, I did, the janitor.

Q. To the janitor?

A. Yes. I assumed it was he who left the doors open.

Q. Which door would be most frequently left unlocked?

A. The rear door going into the hangar.

Q. I see. Was there ever any occasions when you found the front door unlocked in the morning?

A. Occasionally, but not as often.

Q. Not as often. That rear door was—what kind of a lock [90] was on it?

A. It wasn't exactly a lock, sir, had a bolt you pulled and went into a wooden slot, the wooden slot itself is broken partly, I mean, the hole that was bored where the bolt goes through, you could see where the wood had been sort of gnawed away, that was the only way to secure that door.

Q. Did that door open in towards the office, or did it open outward?

A. It opened outward, sir.

(Testimony of Evelyn Keene.)

Q. Yes. And what was on the other side of that door when you went through it from the rear office, what you call the inside office?

A. I don't quite understand, Mr. Davis.

Q. I mean, did that door open out on to a vacant lot, a street or alley or what?

A. No, sir, that door opened into the hangar.

Q. Into the hangar? A. Yes.

Q. And this office was occupied, the rear of this office had a common wall with that hangar, did it not? A. Yes, that's right.

Q. Yes. And that hangar was, was that hangar enclosed?

A. No, sir, the hangar does have door that will close but it was open on both ends. [91]

Q. Both ends?

A. So you can move airplanes in and out. It is a storage hangar.

Q. When you spoke to the janitor about leaving the doors unlocked, did he ever admit he had done that?

A. I used to say, "Harold, you left the doors open again. Would you please be more careful next time?" "Yes, I will, Mike." And I would let it go at that.

Mr. Davis: I think that is all.

The Court: Anything else?

Mr. Miller: Just one question.

(Testimony of Evelyn Keene.)

Redirect Examination

By Mr. Miller:

Q. This hangar that Mr. Davis has asked about, was that inside of an enclosed closure or fence?

A. It's the same place that our lean-to offices are in, it is the same building.

Q. Yes, but I mean there is a fence between the hangar and the public street, isn't there?

A. No, sir, there is a fence but they don't close it, that is where you drive into the airport. That is opened all the time.

Q. So any one of the general public could drive into the hangar or walk into the hangar?

A. That's right. [92]

Q. Right off the public street?

A. Right off the street there, uh-huh.

Q. In other words, there is no—there is a fence there but there is a gate and a fence?

A. I believe there is a gate and fence, but I have never seen it closed. That is where the delivery trucks and the freight pickup for United go through there.

Q. And it is left open all night long?

A. Yes, sir, to my knowledge it is left open all night long.

Q. Yes.

Mr. Miller: No further questions.

The Court: Is that all?

Mr. Davis: That is all.

Mr. Miller: Inspector Mallon.

ALVIN J. MALLON

was called as a witness on behalf of the plaintiff, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Alvin J. Mallon.

Direct Examination

By Mr. Miller:

Q. You're an Inspector of the Oakland Police Department? [93] A. That's correct.

Q. How long have you been with the Oakland Police Department?

A. Fifteen years, four of which were in the service.

Q. When you say in the service, service of the United States? A. Right.

Q. Yes. And for how many of those years have you been in the rating or classification of Inspector?

A. Five years.

Q. And in that position have you had occasion to investigate robberies and thefts at frequent intervals? A. I have.

Q. For how long have you been engaged in the investigation of robberies and burglaries, that type of offense?

A. Well, we have different details. The detail I am working on and have been for the past year and a half is called the grand theft detail.

Q. Yes.

(Testimony of Alvin J. Mallon.)

A. That is the type of detail which would handle this type of case.

Q. Have you been on that for about a year and a half? A. About a year and a half.

Q. During your time with the Oakland Police Department have you had occasion to attend any police training schools? A. Yes, I have.

Q. Will you tell us what training schools you have attended? [94]

A. Well, I have gone to several schools within the Department and some which were conducted by the F.B.I., within the Department, and California Police Officers Training School, which was a one week course at the University of California.

Q. Did those courses, or any of them, include training in the investigation of this type of offense we are talking about here?

A. Well, they included thefts, not this particular type.

Q. Yes. Did they include training in investigative methods? A. Yes, they did.

Q. Did you in your capacity as an Inspector for the Oakland Police Department have occasion to investigate the theft which occurred on either November 27 or 28, 1953, at the offices of Independent Military Air Transport Association at the Oakland Airport, Oakland?

A. Yes, sir, myself and Inspector Eric Gustavson.

Q. Was Inspector Gustavson with you when you went to investigate that? A. Yes, he was.

(Testimony of Alvin J. Mallon.)

Q. And did you stay together during the course of the investigation?

A. Yes, about 90 per cent of the time.

Q. I will ask you, you have with you some papers. Will you tell us what those are? [95]

A. These are more or less a resume of what we did in the case and things that were said to us, told us by the employees.

Q. Was that resume made by you from your own report in the case? A. Yes, it was.

Q. You, as a result of your investigation, did make a report, is that right?

A. We did, yes.

Q. You have made a resume from that report yourself and that's the papers you are referring to at this time?

A. Some of this may have been typed by a stenographer, I am not sure of that.

Q. But it was taken from your own report?

A. That's right.

Q. Do you recall what time of day and the hour of the day that you were called to the Oakland Airport?

A. Well, I was over, my wife and Inspector Gustavson's wife, the four of us were together at Inspector Gustavson's house in Oakland on Saturday evening, and we received a call, in fact Inspector Gustavson received a call about ten o'clock at night that there had been a large theft at Oakland Airport and for us—the following day was our

(Testimony of Alvin J. Mallon.)

day off—we went to the Airport the following morning.

Q. Yes, so that you got there on Sunday morning?
A. That's right. [96]

Q. Had there been any investigation made by anyone in the Police Department prior to that time?

A. Yes, there had been an officer sent first to make an official police report, and we have technicians who are, get special schooling in lifting fingerprints and photography and things like that, and they are sent to the scene. Officer Lucas was sent there after the officer made his initial report.

Q. And do those technicians that make an investigation, such as the fingerprint men, do they report directly to you their findings?

A. They make a sheet, which is sent to us.

Q. And you received from the technicians that investigated in this case a report of their findings, did you?
A. Right.

Q. Well, Inspector, will you relate to us the conditions which you found in this office at the Airport and just what you and Inspector Gustavson did from the time you got there in the investigation of this robbery?

A. Could I narrate what we did?

Q. Yes, narrate what you did as well as you can remember it, and if we need more we can ask questions. Just narrate what you and Inspector Gustavson did?

The Court: Can't you shorten that, coun-

(Testimony of Alvin J. Mallon.)

sel? What is admissible is only something that the—— [97]

Mr. Miller: Yes.

The Court: ——witness found there and saw.

Mr. Miller: I will try to narrow it, your Honor.

Q. When you got there did you make a physical examination of the premises?

A. General physical examination, yes.

Q. Yes. And did you observe any evidence that there had been any forcible entry of those premises?

A. Not at that time.

Q. Did you find any evidence at any later time to indicate forcible entry? A. No, we did not.

Q. Did the report made to you by the technician who had checked before hand——

Mr. Davis: We object to what the report recites to him by the technician, entirely hearsay.

The Court: What are you going to ask him?

Mr. Miller: I was going to ask him if the reports made to him in connection with this investigation by the technical experts who investigated this indicated any forcible entry of the premises.

Mr. Davis: I object to what the technician's report shows.

The Court: Why don't you—this is not something that's foreign to the Court—ask him what he found as to [98] the condition of the various things. I have read the complaint, I know what the report is, that is attached to the complaint and why don't you ask the witness what he found with respect to the door and the desk and box, and so forth.

(Testimony of Alvin J. Mallon.)

Mr. Miller: I will.

Q. Did you find any evidence that there had been any forcible entry through the front door of those premises? A. I did not.

Q. Did you, in connection with your investigation, endeavor to open that front door without a key? A. I don't believe I did, no.

Q. Did Inspector Gustavson?

A. I don't recall whether he did or not. We looked at the door.

Q. You examined the door? A. Yes.

Q. From your examination of that door did you ascertain whether or not it could be opened without a key? A. It is my opinion it couldn't be.

Q. What was the condition of the door which led you to that opinion, will you describe it?

A. Well, when a door and the door jam come together, it is possible to take a laminated card, thin type, and by pushing the door very gently and keep jamming this card into [99] the door, you can slip the lock back and sometimes open the door; but in this door, there was a material, either wood or metal, I am not sure, that protruded about a half-inch past the door jam which, you have to, in putting a laminated card in there, make a ninety degree angle to hit the lock. To me it was almost impossible to do that.

Q. In your opinion it would be impossible?

A. In my opinion it would be impossible.

Q. That was from your examination of the door?

A. That's right.

(Testimony of Alvin J. Mallon.)

Q. Did you find a window that was unlocked?

A. Yes, I did.

Mr. Davis: Wait a minute. You weren't there until Sunday morning?

The Witness: That's right.

Mr. Davis: This loss is supposed to have occurred sometime Friday night.

The Court: Well, the witness can tell what he found when he was there.

Mr. Davis: I mean, whether the window was locked or unlocked when he got there, I don't believe would have any bearing on the case.

The Court: Well, I have read this complaint and the documents attached to it, and there are some other events from which a person can draw conclusion, no matter when he [100] looked at it, the entry was not by any window.

Mr. Miller: I think the question is proper.

The Court: I will overrule the objection.

Q. (By Mr. Miller): On Sunday morning when you got there, was one of the windows unlocked?

A. I don't know whether it was unlocked. The window was pointed out to me and I examined the window.

Q. You looked at the window? A. Yes.

Q. And what condition did you find as to the window, clean or dirty or what?

A. The window was very dirty and dusty, and I understand——

Mr. Davis: No.

(Testimony of Alvin J. Mallon.)

Q. (By Mr. Miller): What did you see? Were there any cobwebs on the window?

A. At that time I didn't notice, but I subsequently found, by talking to the technician——

Mr. Davis: We don't want to know what he was told by the technician.

The Court: He said that he talked to the technician and subsequently you looked at it, I understood you to say, or did I?

The Witness: I didn't look at it for that specific thing until——

Mr. Miller: Yes. When did you talk to the technician? [101]

A. I believe it was the following day.

Q. Where was that conversation, if you recall?

A. I don't recall. I believe it was in the City Hall, but I am not positive.

Q. Was it at the City Hall? A. Could be.

Q. Was Inspector Gustavson there with you?

A. I don't recall.

Q. What was the technician's name?

A. Lucas.

Q. Lucas. Did you talk to him about this office at the Airport? A. Yes, I did.

Q. What did he say to you at that time?

Mr. Davis: We object to what he said, your Honor.

The Court: Yes.

Mr. Davis: Hearsay.

Q. (By Mr. Miller): Now, coming back to the day you went out to the office you looked at these

(Testimony of Alvin J. Mallon.)

windows? A. Yes, I did.

Q. And you don't recall whether either one of them was opened at that time?

A. I don't recall, no.

Q. Did you examine the back door?

A. I did. [102]

Q. Did you observe the type of lock that was on that back door? A. Bolt lock on the door.

Q. Does that bolt go into the woodwork, or does the bolt fit into a metal socket?

A. I am not sure now, couldn't state for sure.

Q. Did you endeavor to open that door while the bolt was on? A. I believe I did, yes.

Q. Were you able to open it while it was bolted?

A. No, we weren't.

Q. Did you see this cash box from which the money was supposed to have been taken?

A. Yes, I did.

Q. Did you observe that cash box?

A. I looked at it, I didn't—I don't believe I touched it, which had been dusted for fingerprints and the powder was still on the box so I didn't touch it.

Q. You didn't touch it at that time?

A. No.

Q. Did you at a later time take that cash box to the police station at Oakland?

A. Yes, we did.

Q. Did you there endeavor to open it?

A. The cash box was first brought to the criminologist, who is the criminologist for the Police

(Testimony of Alvin J. Mallon.)

Department, and he [103] attempted to lift prints off the cash box, and when he couldn't lift—first of all, when we brought the cash box in the cash box was locked and the technician wanted, I mean the criminologist wanted the cash box opened so he could dust, and they tried to open it with pick locks, couldn't had to quit that, and then it was turned over to the criminologist and he dusted for prints.

The Court: Any evidence this box had been forcibly opened?

The Witness: No, no evidence.

Q. (By Mr. Miller): Did you examine the desk out in this office in which the cash box was supposed to have been locked? A. Yes, we did.

Q. Did you find any evidence that the desk had been forcibly opened?

A. It was not forcibly opened.

Q. Did you personally question the employees of Independent Military Air Transport Association?

A. Either I did or Inspector Gustavson did.

Q. And what employees, if you remember, did you question?

A. Mr. Scott, Mrs. Keene, Mr. Farquhar, Mr. Held, Mr. Pitts, the janitor, Mr. Baker. I talked to the guards I talked to the service station attendant across the street. I believe that is about all. May have talked to a couple more. [104]

The Court: Does the report show whether any fingerprints were found?

(Testimony of Alvin J. Mallon.)

The Witness: No fingerprints were found; there were smudges, Judge.

The Court: Neither prints on the desk or the cash box?

The Witness: That's right.

Q. (By Mr. Miller): In any of your investigations did you receive or find any evidence that there had been any forcible entry of either the office, the desk, or the cash box? A. We did not.

Q. I think you have testified that you later inspected those windows again. Did you find any evidence as to whether any entry had been made into that office through the windows?

A. Upon checking it, from what I found, I couldn't see how anybody could have gotten in there.

Q. What was the reason for that?

A. Because there was dust along the window, window sill, and anybody coming in would have brushed up against that and knocked some of the dust off. Everything seemed to be undisturbed around the window, appearing like it hadn't been opened for some time.

Q. Did you question any of these witnesses on what we call the lie detector?

A. Yes, we did. [105]

Q. And which ones were questioned on the lie detector?

A. Mr. Scott, Mr. Farquhar, Mrs. Keene, Mr. Held, Mr. Pitts, the janitor, and Mr. Baker.

Q. Were any of those lie detector examinations inconclusive as to results?

(Testimony of Alvin J. Mallon.)

Mr. Davis: We object to what the lie detector showed.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Miller): How many days did you spend on this investigation, if you recall?

The Court: I take it under the pleadings in this case and under the provisions of the policy it isn't necessary that the plaintiff, in order to recover, would have to show that any particular person was guilty of the offense?

Mr. Davis: No. They must, however, show that some one employee, one or more employees——

Mr. Miller: Reasonable evidence.

Mr. Davis: ——was guilty of it.

Mr. Miller: Reasonable evidence.

Mr. Davis: They do not have to identify a particular employee, but they have to furnish convincing evidence that it must have been.

Mr. Miller: I object to the use of convincing evidence. The policy says reasonable.

The Court: I have tried to apply this rule to certain classifications, but the appellate court wouldn't go with it. [106] I think you have to stick to the old-fashioned rule of the preponderance of the evidence.

Mr. Davis: I think that is right, yes.

Q. (By Mr. Miller): About how long were you engaged in this investigation?

A. Offhand I would say ten days.

Q. About ten days? A. Yes.

Q. From your experience as a police officer and

(Testimony of Alvin J. Mallon.)

as a police inspector, and from your investigation of this incident, your physical investigation, your questioning of the witnesses, what is your conclusion as to the probable cause of this loss?

Mr. Davis: Now, wait a minute. We object to that on the grounds it calls for a conclusion, not a matter of expert opinion, up to the Court to determine.

The Court: I am inclined to think counsel is right, Mr. Miller.

Mr. Miller: Your Honor, I think here's a man who is certainly engaged, and has been for a number of years investigating, as an officer, of this type of offense. I think he is entitled to draw his conclusions as to whether, from that investigation as an expert, we feel he is an expert in the field of criminal investigation.

The Court: Well, I am not in any way derogating against [107] the officer's ability to perform these services, but if the Court has evidence that such and such was the condition of the box, that such and such was the condition of the door, such and such was the condition of a window, I think in that respect the Court would be just as good an expert as any other expert, because after all it is just evidence, and what inferences would be drawn from that are usually within the province of the fact-finder. I don't think it would add anything.

Mr. Miller: I will withdraw the question, your Honor.

(Testimony of Alvin J. Mallon.)

You may cross-examine. We are perfectly content to let the Court draw his own conclusions.

Cross-Examination

By Mr. Davis:

Q. Did you attempt to open this door by the use of a plastic card and shaking?

A. I didn't, no.

Q. You didn't attempt it? A. No.

Q. Did anyone in your presence attempt to open it in such a manner? A. Not that I recall.

Q. I see. While you were there did you, anyone demonstrate to you how that desk could be opened without the use of a key? [108] A. No.

Q. Anyone call your attention to the fact that it could be opened without the use of a key?

A. I don't think it was on that day, I think later Mrs. Keene told us she had opened it from underneath.

Q. But she didn't show you how she had done it?

A. No.

Q. You didn't check to see whether it could be done? A. No.

Q. This back door that opened outwardly from what has been designated or referred to as the inside room, opened into this hangar, is that correct?

A. Yes, sir.

Q. Yes. Now, did you observe whether there was any particular space between that door and the door frame when the door was closed?

(Testimony of Alvin J. Mallon.)

A. Well, if I did it was not obvious there was any space. I don't recall looking for that particularly.

Q. Did you observe that there was, the wood in which the hole was bored that this bolt slipped into was badly worn?

A. I didn't know that, no, sir.

Q. You didn't notice that. Did you pay any particular attention to that door itself?

A. I don't recall whether we did. I know Inspector Gustavson went on the outside, shook the door real hard several times and it was still solid. We felt if anybody [109] would open it it would break the jam or something.

Q. When a door opens outwardly, if there is any particular space between the door and the frame when it is closed, it is not very difficult for someone with a pen knife or some other sharp metal instrument to slip the bolt, is it?

A. I imagine so.

Q. And if one did enter through that rear door, shove the bolt shut after they were in and walk out through the front door and lock it without using a key or anything?

A. It is possible.

Q. Yes. Now, if this tin box—I believe it was described here by one of the witnesses as being a box about three inches deep, and I have forgotten what the other dimensions were, eight, ten inches long and six inches wide, something like that, you remember that box?

A. I remember the box, yes.

(Testimony of Alvin J. Mallon.)

Q. Would that be about the size of it?

A. Might be a little bigger than that.

Q. A little bigger than that. That is a very ordinary box, isn't it? A. Yes, it is.

Q. Rather common. And the keys that are used in those are not very complicated, are they?

A. No, just a little small key.

Q. Yes. I mean, a great many little keys would open the locks [110] in those boxes?

A. I don't know about that.

Q. For example, something like suitcase locks and things like that where one key might open a half-dozen that would be picked up in the immediate vicinity?

The Court: I don't think that would be true, counsel, you would have to get a lot of evidence on that.

Mr. Davis: Funny thing, your Honor, I have one key that will open three suitcases.

The Court: You better get a new key, then.

Mr. Davis: I lost the keys to two of them and I was going to get them made and tried the key of another suit case.

The Court: I suppose they probably have skeleton keys for those kinds of locks just as there are skeleton keys for door locks. You might try one hundred keys and not get one that would open the lock. It would be hard to say, isn't that right?

The Witness: Yes, sir, this lock was—this box was pretty difficult to open because when it was brought in it was locked and it was Lieutenant

(Testimony of Alvin J. Mallon.)

Waters who was in charge of the case over us and he had some pick locks and attempted to open the box with a pick lock and couldn't do it.

Q. (By Mr. Davis): What do you mean by that, pick locks?

A. They are long keys about this long (indicating) in all different shapes that you stick in there. [111]

The Court: Try to find the right combination?

Mr. Davis: Like a hairpin.

The Court: All different shapes and fit maybe one or two at a time?

Mr. Davis: Like an old lady who uses a hairpin to open the locks.

The Witness: Yes.

Q. (By Mr. Davis): You said something about you questioned the guards. Which guards were they?

A. The Airport guards. The City of Oakland has these guards that patrol the area surrounding the Airport.

Q. I see.

A. And each one had a specific beat, and we asked them if they had noticed anything peculiar that evening.

Q. How many of those guards are there around the Airport, do you know?

A. I think there are three or four on in the day; in the evening I am not sure.

Q. Covers the whole Airport area?

(Testimony of Alvin J. Mallon.)

A. All except about that area where they have their own private guards.

Q. Well, there were no private guards around the—— A. Not around this area, no.

Q. And what is the acreage of that Airport proper, or the dimensions of it? [112]

A. I wouldn't have any idea.

Q. Several miles long?

A. Several miles, yes.

Q. How wide, a mile wide?

A. Easily that much.

Q. Yes. Three guards couldn't be watching every place at all times?

A. They have a jeep, too, jeep patrol.

Q. Couldn't cover that whole area?

A. That is right.

Q. They hadn't noticed any suspicious characters around? A. No.

Q. Now, you say there were no prints found on the desk or the cash box. You heard evidence here, I believe, of prior witnesses that they had taken, they had unlocked the desk and taken the cash box out of the desk on Friday morning. Didn't you find their prints?

A. I mean by prints something that can be used for identification. There were smudges.

Q. Oh, I see.

A. Smudges on the box, but there were no prints that could be used to——

Q. There was no evidence anybody had wiped the box clean to eliminate those?

(Testimony of Alvin J. Mallon.)

A. No. What I meant by prints, something used as evidence. [113]

Q. You couldn't identify them, you couldn't bring them out enough——

A. That is correct.

Q. ——to be able to match them up with anybody's prints?

Mr. Davis: I think that is all.

The Court: Is that all?

Mr. Miller: That is all. Thank you.

(Witness excused.)

Mr. Miller: Inspector Gustavson.

ERIC GUSTAVSON

was called as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Eric Gustavson, G-u-s-t-a-v-s-o-n.

Direct Examination

By Mr. Miller:

Q. You're an Inspector of the Oakland Police Department? A. I am.

Q. How long have you been with the Oakland Police Department? A. 14 years.

Q. How long have you been an Inspector?

A. I believe it is about 7 years now.

Q. Did you go with Inspector Mallon to investigate this theft [114] that occurred at the Oakland

(Testimony of Eric Gustavson.)

Airport in November of 1953? A. Yes, I did.

Q. When you went there did you examine the premises? A. I did.

Q. Did you examine the front door?

A. Yes, I did.

Q. Did you endeavor to open that front door without a key?

A. Yes, it was shook quite a bit trying to open it, the door, but that was about all that was done.

Q. Did you endeavor to slip the lock with a plastic card?

A. Well, I would say in my opinion——

Mr. Davis: Didn't ask for his opinion.

Q. (By Mr. Miller): Did you try?

A. Did I? No, sir.

Q. From your examination of that door think it would be possible to slip it?

A. I don't think so.

Q. Was that because the way the door closes?

A. That is correct.

Q. Will you describe why?

A. Well, the door comes up against a—I would say a half-inch to three-quarter inch jam, and I believe it is metal—I am not positive of that—but in order to be able to insert one of these plastic cards that has been described, it is necessary that there be a space between the [115] jam and the door frame itself so that the card can, will go between the jam and the frame and up to the door where the lock goes into the slot. This particular jam that is up against the door in question has been

(Testimony of Eric Gustavson.)

painted so many times that I would say there is at least one-eighth of an inch of paint on it and absolutely no crack between the jam and the door frame itself. The only way you could get a card in there would be that it would have to go straight in and make a complete 90 degree bend to get into where the portion of the lock goes into the frame so that it would be almost impossible to get a plastic card at those angles and still maneuver it to the point where you could slip the lock.

Q. Now, did you examine the windows in the office? A. Yes, I did.

Q. Was there any evidence at all of any forcible entry through those windows?

A. There was not.

Q. Did you examine the back door?

A. I did.

Q. Was there any evidence of any forceful entry through that back door?

A. There was not.

Q. Did you attempt to open that back door when it was bolted without releasing the bolt? [116]

A. Yes, we attempted to pull the door open and it would not open, of course, with the bolt in position. We removed the bolt, that is, slid the bolt back, and even with the bolt out the door is—apparently the building has settled, anything that would cause it to jam—it was very, very difficult to open even with the bolt slipped out of the hole that was bored for it to slide into.

(Testimony of Eric Gustavson.)

Q. Did you examine the desk? A. Yes.

Q. Was there any evidence of any forceful entry in that desk?

A. There was not. Speaking of the desk where the money was supposedly left?

The Court: Yes, I take it that is what he is asking,

The Witness: Yes.

Q. (By Mr. Miller): I wasn't sure I got that last.

A. I say, talking of the desk where the money box was left?

Q. Yes, the desk in the rear office where the money box, where you were told the money box had been left?

A. That is right, there was no evidence of any forceful entry made on the desk.

Q. Any evidence of any forceful entry of the other two desks in the office?

A. Yes, Mrs. Keene's desk, there was considerable chopping or pounding or something had gone on to attempt to open one [117] or two, I don't remember now, the drawers in Mrs. Keene's desk, and she explained to us that she herself, and I believe Mr. Pitts, the janitor, had attempted to open it on one occasion when she had lost or left her keys at home.

Q. That was her desk?

A. That was her desk.

Q. You inquired about that and that was the explanation? A. That is correct.

(Testimony of Eric Gustavson.)

Q. Yes. Did you examine this cash box?

A. Yes, I examined it.

Q. Any evidence of any forceful breaking of the lock in the cash box?

A. There was not.

Q. Were you present when this cash box was, they endeavored to open that cash box at the Police Department in Oakland?

A. With the picks, yes, I was.

Q. You were present?

A. I was.

Q. And were they able to open it?

A. They were not.

Q. About how long were you in this investigation?

A. I am not too sure. I think Inspector Mallon said ten days; I would say from ten days to two weeks.

Q. And as a result of the police investigation was anyone apprehended and charged with this offense? [118]

A. No, they were not.

Q. From the layout of that office as you observed it, if there had been—if it were night and there were lights on in the office, could you see it from the outside readily?

A. Yes, yes, you could see it from the outside.

Q. Was there a window in the front or just a glass door?

A. No, the entire, about half-way up, I would say, of the wall, the entire wall is small panes of glass in a metal frame.

Q. So that you could readily see into the office

(Testimony of Eric Gustavson.)

from the outside?

A. Yes, you could see in from the outside.

Q. Was there any evidence of any forceful entry through that front window?

A. None whatsoever.

Q. Is there a gasoline service station in the vicinity of that office?

A. Directly across the street.

Q. Directly across the street?

A. That is right.

Q. Do you know if that service station remains open at night?

A. It remains open 24 hours a day.

Q. That is directly across the street from this office?

A. That's right. [119]

Q. Is that a well-lighted service station?

A. Yes, it is very well lighted.

Q. And would the lighting from that service station also light up the area in front of the office?

A. I would say that it would, yes.

Q. Were you with Inspector Mallon when the employees were questioned?

A. Yes, I was.

Q. And do you recall what persons were questioned by you and Inspector Mallon?

A. Yes, Mr. Scott, Mr. Farquhar and Mrs. Keene and Mr. Held and Mr. Pitts, Mr. Baker. I don't recall the guard's name. There were two or three guards from the Airport, and the people at the gas station and several other janitors, Mr. Mallon men-

(Testimony of Eric Gustavson.)

tioned, the names I don't recall.

Mr. Miller: You may cross-examine.

Cross-Examination

By Mr. Davis:

Q. This rear room, could that be seen from the street if anyone were in there around the desk from which you were told this money was taken?

A. You mean could someone standing outside the window look in and look into the rear room, is that what you mean?

Q. From the street, I mean.

A. From the street, you mean, across the [120] street?

Q. No, from the front. As I understand it the front of this office building or this lean-to, whatever you want to call it——

A. Yes.

Q. ——fronts on the street?

A. That's right.

Q. Could anyone from the street see into the rear office? A. I would say yes.

Q. And observe anyone that might be at the desk from which you were told this money was taken?

A. If someone looked through what would be the front wall or which faces the street, yes, they could see into Mr. Scott's office because it is just a wall of glass in between the two offices, that is, oh, I would say three and a half foot wooden wall and

(Testimony of Eric Gustavson.)

the balance of it was glass, and the same with the front.

Q. And the front wall of the building where this front door was was constructed how?

A. Well, as I recall it is constructed of metal. I don't know how to describe it.

Q. Corrugated metal of some kind?

A. Well, I don't recall whether it is corrugated, I think it is a flat metal, but with the metal window sash in it with window panes that are about 12 by 18, or something like that. Maybe smaller. [121]

Q. Does that go clear to the ground?

A. No, they go, I would say three, three and a half feet from the ground. I mean, from the ground up about three or four feet would be solid metal.

Q. Yes.

A. And from there to the ceiling is the window sash. It is a solid wall of window sash.

Q. And is that true on the sides, too?

A. I believe—I am not sure. I believe on the front part there is, I am not too sure.

Q. What is the condition on the side walls there, calling the entrance the front of the building, what is the condition of the side?

A. As I recall, I am not positive, of course, but as I recall both sides are solid. There may be a small portion of what would be, has been described as the front office on the, would be the east side of the building that would be glass, but I am not positive.

Q. Now, where this is located during the night-

(Testimony of Eric Gustavson.)

time would there ordinarily be very much traffic by there or around that vicinity?

A. Truthfully I wouldn't be able to say whether traffic would be heavy or not.

Q. Had you ever been out there at night before this thing occurred? [122]

A. Oh, yes, I have been to the Airport many times at night.

Q. At night did you ever observe whether there was much traffic, is there much going on right through there at that time?

A. Well, that is pretty hard question to answer in this respect, depending upon the flights coming in. It is close to the administration building and depending on the number of flights coming in and going out would control how much traffic was going back and forth.

Q. Would all traffic to and from the main place of departure and the place where planes would come in, passengers pass this particular office?

A. No, they would not pass it. However, the main—the administration building or reception building, whatever you call it at the Airport would be a matter of, roughly speaking, hundred and fifty, maybe two hundred feet east of this lean-to. In other words, it is in the immediate vicinity.

Q. Yes, but going from the administration building getting away from the Airport——

A. You would be leaving the building going in the opposite direction.

(Testimony of Eric Gustavson.)

Q. You wouldn't be coming toward this building?
A. No, sir.

Q. That is what I am talking about. [123]

A. No.

Q. As far as this gasoline station across the street is concerned, wouldn't it be possible that that might at some times be closed at night a portion of the night?

A. It is possible, however, I don't know.

Q. You don't personally know?

A. No, sir.

Q. Whether it stays open every night or not?

A. That I don't know, no, sir.

Mr. Davis: I think that is all.

Redirect Examination

By Mr. Miller:

Q. When you questioned the employees of the gasoline station—I understand you questioned those employees, did you not?
A. Yes, we did.

Q. Did you ascertain from them if——

Mr. Davis: Now, wait a minute——

Q. (By Mr. Miller, continuing): The service station is always open?

Mr. Davis: I object to that on the ground it would be hearsay.

The Court: The witness already has testified that the station is open all night.

(Testimony of Eric Gustavson.)

Mr. Davis: Well, he says now he doesn't [124] know?

The Court: Another witness testified that the gasoline station was open all night.

Mr. Davis: No, he didn't testify from his own knowledge. He says he doesn't know.

The Court: May be true. I say another witness has already testified that the gasoline station is open all night.

Mr. Miller: Well, I will leave it rest there.

Mr. Davis: I didn't hear anyone else testify.

The Court: Yes.

The Witness: All I can say it is advertised it is open 24 hours a day. I don't go out there to see it is open.

Mr. Davis: Yes.

Mr. Miller: That is all.

(Witness excused.)

Mr. Miller: Any more questions of the Inspector?

Mr. Davis: Not that I know of.

Mr. Miller: Plaintiff rests.

Mr. Davis: At this time, your Honor, the defendant would move the case be dismissed on the grounds there is no evidence to establish there is any reasonable grounds for believing that this loss was caused by the dishonesty of any employee of the plaintiff. The plaintiff's own witnesses have testified that these doors could be opened without keys, that the desks could be opened—desk could

be [125] opened without keys, that the box was a very common ordinary box which any flat key would open.

The Court: I don't think there is any such evidence to that.

Mr. Davis: What is that?

The Court: I don't think there is any evidence to the effect this box could be opened by any flat key.

Mr. Davis: Well, that it was a common, flat key.

The Court: Well, common, common type of key.

Mr. Davis: Yes.

The Court: No evidence to show any flat key would open it.

Mr. Davis: I don't mean any flat key, no, but I think it is going a long way on the evidence here to find that any of the employees who had any access at all to this office or building or who had keys to the building were guilty of this crime. I think—I can call the other employees here if your Honor thinks it is necessary. I have here the remaining two employees who have not yet testified.

The Court: Well, the policy says that any dishonest acts committed anywhere by any of the employees acting alone or in collusion with others——

Mr. Davis: That is correct.

The Court: It might not be necessary to prove under the terms of the policy that any specific act took place, even [126] in the premises.

Mr. Davis: Well, of course, there is no evidence of any act anywhere else.

The Court: You can't tell that. All we know is that in the evidence that the box was where the money was placed in the drawer one day and the next day when the box was opened it was empty.

Mr. Davis: That's right.

The Court: Still not necessarily conclusive proof that the money was taken, it was taken on the premises, the box might have been carried away some place else and the money removed and the box brought back again.

Mr. Davis: Oh, I think as far as that is concerned I don't think it makes a bit of difference where the money was taken out of the box, the whole question is by whom. If it were not taken out by an employee, then there is no obligation under the policy.

The Court: Well, it might be a close question. I suppose different triers of the facts might draw different inferences from these circumstances. If it is a close question, then I think it ought to be resolved against the insurance company. If it is a close question.

Mr. Davis: Of course——

The Court: Because that is what the man, the insured pays his premium for, to get some protection. [127]

Mr. Davis: The burden——

The Court: It is just a technical—if the question has to be decided by the court's eye, then I would say the decision would have to go against the insur-

ance company. I am just talking about the evidence that is in now.

Mr. Davis: Yes.

The Court: But if the evidence is reasonably susceptible to an interpretation in favor of the insured, then I think the Court should indulge in that inference. There is no direct evidence, of course, in this case and the question is what are the reasonable inferences to be drawn from the evidence, and, of course, the satisfactory proof to sustain a course of action may result in inferences as well as from actual proof.

In other words, a person might not see another person at a particular place at the time by physical senses, but yet there may be evidence of other circumstances from which the inference can be drawn that the person was there, and those inferences are equally to be considered, properly to be considered, I will say, in determining whether the evidence is sufficient to prove the ultimate fact—— [128]

That is what you have in this case, of course, what is a reasonable inference so far from the evidence produced by the plaintiff. And at this point I would say that there is enough to draw a reasonable inference that this act was committed in some manner by some employee, neither alone or in association with someone else, because you have to engage in assumption of the concurrence of too many factors the other way. You would have to assume, if this act was committed by a stranger, by the way of robbery, that he would have a means of get-

ting into the building, that he would have a means of getting into the desk, and after he did all that, then he would have a way of opening the box without doing violence to it, removing it, putting it back.

Now, to show that, to draw an inference that this was a violent act of an intruder, you have to indulge in a presumption in favor of all those things being so.

Well, I suppose there are very astute burglars today. I read a report not so long ago in a case, criminal case that I had, in which the probation officer referred to the defendant as an expert professional burglar. So I suppose that in that field, as well as in other fields, the authorities recognize experts, too. So that's possible, that there might have been a man, an intruder so expert that he was able to overcome all of these obstacles, the [129] doors, or the windows, the desk, and then the box, itself. Either he was expert enough to have the supplies and equipment to enable him to do all these things without leaving a mark, or that he was able to get possession in some manner of all the necessary keys to all these things, or that he was so familiar with the desk that he was able to open it with it all prearranged in advance; all these circumstances had to combine, that he knew that this box of money was going to be there on that night, and he had all these things, these possibilities open to him and had some knowledge of expertness to do all these things, to accomplish all these things.

Now, that's possible, but what is the reasonable

inference to draw from the facts is before us now; that is all we are concerned with on a motion to dismiss after the plaintiffs' case is in.

You may have something further to say, Mr. Davis; I am not trying to cut you off, but I think while these facts are fresh in our minds, it is better that I state how I feel about it than not say anything to you. There may be some points I have overlooked that you could call my attention to, but I think—it seems to me that on the bare facts as we have them now, it is a reasonable inference.

Mr. Davis: I think possibly I had better call the [130] other witnesses, then.

The Court: Well, you can reserve your motion and put on your further evidence.

Mr. Davis: Yes, I will call Mr. Held.

RICHARD B. HELD

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: State your name to the Court, please.

The Witness: Richard B. Held.

Direct Examination

By Mr. Davis:

Q. Mr. Held, where are you now employed?

A. I work for Travel Tours; it is a travel agency in the Whitcomb Hotel right up here on Ninth, in San Francisco.

Q. On Market Street in San Francisco?

A. Yes, sir.

Q. And your home is where?

A. I live over in Berkeley, 1709 Cedar Street, Berkeley.

Q. Are you married? A. No, I'm single.

Q. And were you employed during the year 1953 by Independent Military Air Transport Association? A. Yes, sir, I was.

Q. When did you go to work for that [131] company? A. In August of 1953.

Q. And you continued working for them for how long?

A. Until, I believe it was March, March of '54.

Q. March of 1954. Were you employed there in November, the week of Thanksgiving in November of 1953? A. Yes, sir.

(Testimony of Richard B. Held.)

Q. Yes. And what were your duties, Mr. Held?

A. Oh, mainly I was in charge of the—what we call the operational end of meeting incoming aircraft and loading outbound aircraft; and when I wasn't doing that, or whatever it was, it was versatile, I would work in the sales end; I was at different camps at different times, too.

Q. Where?

A. I was—I went over to different—like Treasure Island and Parks Air Force Base—it was seldom—selling tickets. Also to help out.

Q. Was your work in the major portion performed at the office, at the Oakland Airport, or elsewhere? A. At the Oakland Airport.

Q. Yes. Did you have a key to the premises?

A. Yes, sir, I did.

Q. Yes. Were you present in the office at the Oakland Airport on the day and evening, or the day or evening of November 25, which was the day before Thanksgiving?

A. The day before Thanksgiving? [132]

Q. 1953.

A. No, I am not quite clear at this time exactly where I was on that day, because my schedule varied. Sometimes I came in early in the morning to meet airplanes and then went home, and slept odd hours and was back, and at this time I can't recall what I did actually on the day before Thanksgiving.

(Testimony of Richard B. Held.)

Q. Were you there at all on Thanksgiving Day, do you know?

A. Not on Thanksgiving Day, no.

Q. Were you there on Friday morning, the 27th of November, 1953?

A. Yes, I was. Now, let's see, Friday. Yes, I was. I came in actually early in the morning and met some airplanes that were expecting to go to Travis Air Force Base. And, if I remember correctly, it was fogged in up there and had to land at Oakland Airport. So I was—came in early in the morning, and I don't remember the exact time. And I worked up until noon on Friday—yes, Friday noon.

Q. Now, from Friday noon where did you go? You say you worked up to Friday noon. What happened then?

A. Mr. Scott came, let me have the rest of the day off, told me to come back Saturday around noon. And then I took off that afternoon and, oh, I remember, I went over to the cleaners and I bought some shirts; I believe that was established. And then I went home—and I lived with [133] two other fellows in a house at that time—and watched TV that evening and then I went to bed.

Q. Were you back at the airport at or near this office at the Oakland Airport at any time during the night, Friday night, November 26?

A. Friday night, no, sir.

Mr. Miller: 27th, Counsel?

Q. (By Mr. Davis): Or the 27th, I mean?

(Testimony of Richard B. Held.)

A. That is Friday?

Q. That is Friday. A. I was not.

Q. Were you there at any time—how early did you get there on Saturday?

A. Oh, as near as I can recall, I came in, I think, it was around 11:00 or 11:30.

Q. A.M.? A. A.M., yes, sir.

Q. So that you were not near the office from Wednesday (sic) about noon until about 11:00 a.m. on Saturday, is that correct?

A. Yes, sir; as far as I can recall. I am almost positive I was.

Q. Now, Mr. Held, were you there at any time when anyone from the police department made any attempt to open the front door of this office without the use of a key? [134]

A. No; I couldn't say positively on that, that it was a member of the police department.

Q. Was it someone that attempted to open it?

A. Yes; I have been trying to place who it was, but somebody showed us how to take this card and push it between the jamb of the door and if—I tried it, myself; first, I couldn't do it, and then he bent the edges, sort of slide it around between there and I remember particularly that he had to sort of lean on the door to push this card through, and then it would open up. And this guy, I can't remember now, unless it has been passed—no. He did it several times and I tried it and there was somebody else there, but I can't recall at this time who it was.

Q. Did you succeed in opening it?

(Testimony of Richard B. Held.)

A. Yes; I definitely did it myself. I tried the one time with this little calendar card.

Q. Was it with the use of a plastic card?

A. Yes.

Q. Have you that card that we had there? Was that a card similar to the one—it hasn't been introduced—has been marked for identification as Defendants' Exhibit A, was it a card somewhat similar? A. A card similar to that, yes.

Q. Similar to that. You say you finally succeeded, yourself, in opening the door? [135]

A. That's right.

Q. By the use of this card and shaking and manipulating the door without the use of key?

A. You didn't have to shake the door; the main thing was to lean against it, sort of push back along—there is a little edging, I don't know whether that was wood or metal—but you leaned sort of against the door, pushed back; this card would slide in if you bent the edges; it would open it up. Just fooling around afterwards.

Q. In other words, you bent the edges so that it would make practically a right angle?

A. So it would hit this piece inside there and it would slide in.

Q. That would push the catch back?

A. Push the catch back and open it.

Mr. Davis: I would ask that this be introduced in evidence, your Honor.

The Clerk: Defendant's Exhibit A admitted into Evidence.

(Testimony of Richard B. Held.)

Mr. Miller: I have no objection; I don't see what value it is.

(Whereupon card referred to above was received in Evidence and marked Defendant's Exhibit A.)

Q. (By Mr. Davis): Now, Mr. Held, did you have a key to this office? [136] A. Yes, I did.

Q. Yes. Were you acquainted with any former—were you working there when there were any employees who had been employed and who were no longer there in November of 1953?

A. Well, just Bill Drumm.

Q. Bill Drumm? A. Bill Drumm.

Q. And he had left about the 1st of October, is that right?

A. I came in August, and it must have been right around the last of October, last of September or the 1st of October, I am not sure of the exact day.

Q. Yes. Now, were you ever there when a janitor by the name of Baker was there?

A. No; that was before my time.

Q. You didn't know him at all?

A. I knew Baker, yes.

Q. Oh, you did. Did you ever examine this desk that was in the office, that is, the desk from which this money was supposed to have been taken, did you examine that to see if it could be opened without the use of a key?

A. On that particular desk I didn't actually ex-

(Testimony of Richard B. Held.)

amine it. I was present at the time when Mike showed how it could be opened.

Q. Who is Mike? [137]

A. I am sorry. Mrs. Keene.

Q. I see. A. We call her Mike all the time.

Q. What method did she use to open it?

A. She reached underneath and pushed this lever or something. I guess it is a lever under there. And the drawer opened up.

Q. I see. That would open the side drawer?

A. Yes.

Q. Wouldn't open the middle?

A. I don't remember we tried the middle drawer or not.

Q. Now, Mr. Held, did you take this money or any part of it? A. No, sir; no, I did not.

Q. Do you know who did? A. I don't.

Q. Did you ever make any arrangement or agreement with anyone else or give them any information concerning this money or go into any conspiracy with anyone else to take it?

A. No, I sure didn't.

Mr. Davis: I think that is all.

Cross-Examination

By Mr. Miller:

Q. Are you related to Mr. Homer Scott? [138]

A. Yes; he is married to my sister; he is my brother-in-law.

Q. Was he your brother-in-law at the time of

(Testimony of Richard B. Held.)

this occurrence? A. Yes, he was.

Q. Do you know if this Mr. Bill Drumm was employed in Oakland or vicinity in November of 1953? A. Employed by IMATA?

Q. Was he in the vicinity or employed anywhere in the vicinity?

A. Well, he stopped in there a few times after that period. As to whether right at that time he was in Oakland or not, I don't know.

Q. Do you recall if he was there at any time on Friday of November 27?

A. No; I don't know.

Mr. Miller: No further questions.

Mr. Davis: That is all.

Call Mr. Scott.

The Court: I think perhaps we better take a brief recess.

(Short recess.)

Mr. Davis: May it please the Court, I would like permission to recall Inspector Mallon for a couple of questions.

The Court: Very well. [139]

ALVIN J. MALLON

recalled as a witness on behalf of the Plaintiff and, having been previously duly sworn, testified further as follows:

Further Cross-Examination

By Mr. Davis:

Q. Inspector, in your capacity with the City of Oakland during the year 1954, isn't it a fact that prior to the time of the disappearance of this particular money there had been a number of losses in the vicinity of this office and this airport?

A. None that I ever investigated.

Q. None that you investigated? A. No.

Q. You hadn't heard of it?

A. No. I heard of it; I didn't know of my own knowledge. I hadn't investigated any.

Q. Did you have any report of any in your office that you know of? A. Not that I recall.

Q. I think you testified that this gas station was across the street from this office. Isn't it a fact that it is across the street from the Terminal building, the main building?

A. I don't believe I testified it was across the street.

Q. What?

A. I don't believe I testified it was directly across the [140] street. It was across the street.

Q. Do you know where it is located?

A. I know where it is, yes, sir.

Q. How far is it from this office?

A. I would say about 75 feet.

(Testimony of Alvin J. Mallon.)

Q. Is it across the street, exactly across the street from the Terminal Building, isn't it?

A. Well, I'd say closer to the Terminal than it is to this office, but not directly across from the Terminal.

Q. And the Terminal Building, I believe you said, was 150 feet?

A. Inspector Gustavson said 100 feet, I believe.

Q. How much?

A. I think Inspector Gustavson said 100 or 150 feet.

Q. Immediately across the street from this particular building, this office building, is a vacant lot?

A. A parking lot.

Q. A parking lot. And then next to that there is a roadway running at right angles to the street that passes in front of this office?

A. About 200 yards, about 100 yards back of that, the roadway—

Q. Wait a minute. I am talking now about the roadway that runs at right angles to the street that passes in front of this office building and in front of the Terminal Building; [141] isn't there another—you got a parking lot across the street, and then isn't adjoining that a roadway that runs at right angles to the street that passes in front of the Terminal Building? A. I don't believe so.

Q. What?

A. There is a street that runs parallel.

Q. Parallel, but that is a couple hundred yards back. A. Yes.

(Testimony of Alvin J. Mallon.)

Q. Isn't there another roadway between this office and the parking lot—and the Terminal Building?

A. I don't recall any roadway.

Q. That leads into the—I don't mean——

A. There is a road into the parking lot, but I don't know of any roadway or street.

Q. It adjoins the parking lot, doesn't it?

A. I wouldn't say.

Q. A road adjoining the parking lot?

A. Between the service station, as far as I can recall, between the service station and the IMATA headquarters——

Q. Yes.

A. Well, that is a parking area, entrance to go into the parking area.

Q. Yes.

A. Not what I would call a street; no street goes through, [142] no street with a name.

Q. A driveway or a roadway?

A. Might be a driveway.

Q. Now, did you make any investigation as to the weather conditions on the night of November 27?

A. Yes, I did.

Q. And what were the weather reports?

A. From 9:00 o'clock at night until, I think it was early the following morning, there was anywhere from zero to one mile.

Q. From zero to one mile on account of fog?

A. Yes.

Q. In other words, at times it was entirely blacked out, is that right?

(Testimony of Alvin J. Mallon.)

A. At times, yes; it changed frequently. It was blacked out, they call zero, and then it would clear again.

Q. In other words, there would be no ceiling, you might say? A. Yes.

Q. That would be zero?

A. That was the way it was explained to me.

Q. Yes. And at other times it would be as much as how much ceiling? A. A mile.

Q. A mile. That was changing from time to [143] time?

A. Yes; be a quarter of a mile, half a mile, something like that.

Q. Yes.

Mr. Davis: I think that is all.

Mr. Miller: Just one question.

Redirect Examination

By Mr. Miller:

Q. While you were there, Mr. Mallon, on this back door, when you were examining the back door, were there any signs or evidence that anyone had forcibly or by use of a knife or other sharp instrument slipped the bolt?

A. I didn't notice anything.

Q. You didn't see any such? A. No.

Mr. Miller: That is all.

The Court: That is all.

Mr. Davis: Call Inspector Gustavson.

ERIC GUSTAVSON

was recalled as a witness on behalf of the Plaintiff, and having been previously duly sworn, testified further as follows:

Recross-Examination

By Mr. Davis:

Q. Mr. Gustavson, did you have any [144] information in your official capacity there about other burglaries or robberies or thefts in the vicinity of this office prior to the time of this occurrence?

A. Yes.

Q. You did? A. Yes.

Q. And was that rather frequent?

A. I wouldn't say it was rather frequent prior to this. I would say that we had maybe three or four what we call petty thefts at the Oakland Airport. That is, lockers had been broken into; some of the desks in some of the offices had opened. And I can't recall anything about what we would call grand theft, in other words, anything over \$200.

Q. I see. Were there any reports of property or monies missing from desks that had been opened?

A. I believe there were. I am only guessing now, one or two reports that had come in where the desks had been—with some instrument—pried open, that is, drawers of the desks had been pried open.

Q. After this occurrence, were there any reports of similar occurrences in that vicinity?

A. None that I have investigated personally. But I would say there have been one or two, yes.

(Testimony of Eric Gustavson.)

Q. During the past fifteen months, you might say? [145]

A. Yes. Yes.

Q. Now, this gas station that we spoke—I think it was spoken here as though it were across the street from this office. As a matter of fact, that is located opposite the Terminal Building rather than across the street from this office, isn't it?

A. I wouldn't say that it was, as you put it, directly across the street from the Terminal Building. I wouldn't say it was directly across the street from IMATA. From my recollection, the gas station covers quite a large area there. The gas station, as I would describe it, itself, that is, the building that contains the grease racks and the office, whatever you want to call it, and the pumps where the gasoline pumps are, from my recollection I would say were closer to IMATA than it would be to the administration building.

Q. Well, across the street from the IMATA office is a vacant—is a parking lot?

A. If you are going to draw a straight line from IMATA directly across the street, that is still part of the gas station. However, it is maintained for parking facilities because it is run by the gas station, as I recall it.

Q. What I am trying to get at is where the attendant at the gas station would be, how many feet would he be from this office of IMATA? [146]

A. You mean from where the gas pumps or where the office is to IMATA?

(Testimony of Eric Gustavson.)

Q. Where the man on duty all night would be likely to be located most of the time.

The Court: That would probably be all over the place.

The Witness: I don't know where he would most likely be.

The Court: Describe it by where the facilities are.

The Witness: If you mean what the distance is from the gas pumps to IMATA's office?

Q. (By Mr. Davis): Yes.

A. I am only guessing, but I would say maybe 75, 100 feet.

Q. 75 or 100 feet, and across the street?

A. Yes, across the street, it is across the roadway, yes.

Q. Now, do you know of your own knowledge whether that gas station was open all night?

A. From my own personal knowledge?

Q. Yes.

A. Only by the sign that is advertising it, that it is open 24 hours a day.

Mr. Davis: That is all.

Redirect Examination

By Mr. Miller:

Q. Inspector, during your investigation did you talk to the man who was on duty at the gas station [147] the night of November 27?

A. Yes, there were two men that were on duty.

Q. And you talked to both of them?

(Testimony of Eric Gustavson.)

A. Yes, we did.

Mr. Miller: That is all.

Mr. Davis: That is all.

(Witness excused.)

Mr. Davis: Now, I will call Mr. Scott.

HOMER W. SCOTT

was called as a witness in behalf of the Defendant, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: Please state your full name.

The Witness: Homer W. Scott.

Direct Examination

By Mr. Davis:

Q. And where do you reside, Mr. Scott?

A. 1599 Houston Road, Lafayette, California.

Q. Where do you work at the present time?

A. I'm with the Wells organizations, which is located at 333 Montgomery Street in San Francisco.

Q. And what is the nature of the business that the Wells Organization is engaged in?

A. We are professional fund raisers for churches.

Q. In the business of raising funds for [148] churches?

A. That's right, exclusively for churches.

Q. For what?

A. I say exclusively for churches.

Q. Any particular denomination?

(Testimony of Homer W. Scott.)

A. Any one.

Q. Any one? A. Any one.

Q. I see. Now, are you married? A. Yes.

Q. And have you been married for the past three or four years or more? A. Yes, I have, sir.

Q. Have you children? A. I have three.

Q. You were employed by IMATA, as they have been calling it here? A. Yes.

Q. And for what period of time?

A. I was with IMATA for approximately two years.

Q. Beginning what day?

A. Be December of '51 through December of '53.

Q. And when did you leave the employ of IMATA, do you remember the exact date?

A. As I remember the exact date, it was December 12.

Q. December 12? [149]

A. December 12 of 1953.

Q. Yes. What was your position with IMATA?

A. I was western regional manager.

Q. And how long had you held that position? Was that the same position you held at all times?

A. That was my title for the complete duration of my employment. However, the territory was increased to include San Diego. As to the exact date of that, I really don't know; but it was when we anticipated going into what we called the common carriage business, and San Diego was included in the Oakland territory.

(Testimony of Homer W. Scott.)

Q. When you speak of the common carriage business, you are distinguishing that from what other business?

A. What we call the official travel, which was paid for by Government transportation requests, and the common carriage was individual ticket sales to service men.

Q. When you were doing this official business at the Government's request, that was when the Government, itself, would charter a large plane or charter a plane to carry enlisted men to various points? A. Yes.

Q. And the Government would pay for that?

A. That's right.

Q. That would be paid by check; no money would come into your office? [150]

A. No money coming into our office. It wasn't a check, it was called a Government transportation request which the airline used to bill the Government for that particular trip.

Q. Now, on the night or on the day of November 25, which was the day before Thanksgiving of 1953, do you recall having a telephone conversation with someone in Washington, D. C., the office, as to what should be done with a certain large amount of cash that had come into your office? A. Yes.

Q. And what was that conversation?

A. That was a conversation with Mr. Roach in Washington, getting advice from him as to what to do with a large sum of money.

Q. At that time were the banks closed?

(Testimony of Homer W. Scott.)

A. Yes, it was after banking hours.

Q. It was after banking hours. Had the money come in after banking hours?

A. Really truthfully I can't answer that question at the moment. I am not clear. Wednesday, that was the night—that was the day of the move, so the money in all probability, yes, came in after banking hours from Mr. Farquhar.

Q. I see. That was the date of the move. What do you mean by that?

A. That was the date that all of these Marines—or I [151] guess they were Marines—were moving as a result of the sale of these tickets, that was the evening they were all going out from the Oakland Airport by plane.

Q. That was the date they picked their tickets up, is that it? A. Yes.

Q. And paid the balances that were owing on them.

The Court: Mr. Davis, these matters are not in dispute, this part, are they? I mean, the witness isn't saying anything different than the other witnesses said in regard to these general matters. I don't think there is any need of going over them again.

Mr. Davis: Well, possibly——

The Court: Doesn't really bear on the matter that we have here.

Mr. Davis: Yes.

Q. (By Mr. Davis): Now, it has been testified that Mr. Roach advised you to take this money to the

(Testimony of Homer W. Scott.)

Western Union office, or to have it taken to the Western Union office and buy Western Union telegraphic orders? A. Yes.

Q. And why was that not done?

A. I instructed Mrs. Keene to do just that and proceeded with her to the telegraph office. However, after her discussion of the cost involved, she approached me again and [152] suggested that possibly this cost could be saved by putting it into the Transocean Airline's restaurant safe. I respect Mrs. Keene's judgment and agreed possibly that would be the thing to do.

Q. And that was put in the safe that night?

A. Yes.

Q. And then, as I understand the testimony, it was taken out again sometime Friday?

A. Yes, that's right.

Q. Yes. And at that time, up to that time that it was put in the safe the first time, had you counted it?

A. I don't—I really don't know, frankly, Mr. Davis.

Q. You don't know?

A. Before it was put into the safe?

Q. Yes.

A. I don't think I did. I don't think I did.

Q. But on Friday, on about what time was it brought back to the office? Let me be——

A. As to the time element, I really couldn't pin it down very closely.

(Testimony of Homer W. Scott.)

Q. On Friday had you counted it or attempted to count?

A. Yes, I attempted to count it with Mr. Farquhar.

Q. With Mr. Farquhar? A. That's right.

Q. About what time did you start counting [153] it? A. That was late in the afternoon.

Q. I see. You worked with Mr. Farquhar until what time?

A. It must have been around 8:00 o'clock, I would say, in the evening, before we——

Q. I see. And then you and—then you put it in the desk, is that correct?

A. Put it in the desk, yes.

Q. In this tin box?

A. It was in the tin box—and put it in the desk.

Q. You had the key to that tin box?

A. Mr. Farquhar had the keys to the box.

Q. And did you have a key to the box?

A. No, sir, I didn't.

Q. And were there any keys to that box around the office that you know of?

A. It was determined after the robbery that there were keys in the desk in the outer office.

Q. Who had keys to that desk?

A. I don't believe that that desk was ever locked, to my knowledge. It was a desk used by various employees, and as to the whereabouts of keys, I don't know, maybe in the desk drawers, may not have been.

(Testimony of Homer W. Scott.)

Q. You say there were keys that would fit that tin box in that desk in the outer office?

A. I believe that was determined after the robbery, yes. [154]

Q. Now, as to the keys to your own desk there, who had those?

A. There was only one, to my knowledge, and I had that.

Q. Yes. And did you keep that in your pocket or in your desk? A. The key to the desk?

Q. Yes. A. Yes, I kept it in my pocket.

Q. In your pocket. Now, when you left the office on the night of November 27, as far as you know, was the box locked? A. Yes.

Q. The tin box? A. Yes.

Q. Was your desk locked?

A. Yes, as far as I know.

Q. Was the rear door and front door locked?

A. As far as I know, yes.

Q. As far as you know. Now, explain and tell me about the lock on the front door, how it operated.

A. The front door lock—I am not too good at explaining locks—however, to lock it, it had to be locked from the inside. There was a knob, a little knob in the center of the knob which had to be pushed in to its proper location to properly lock the door. And you could close the door [155] and it would automatically lock from the outside.

Q. Yes. Were there any times, to your knowledge, when that operation would be performed by pushing this button or small knob that was inside,

(Testimony of Homer W. Scott.)

the inside knob of the door and then in closing the door where something slipped and the door would become unlocked?

A. Not to my personal knowledge. I have heard that the door—if I understand you correctly—the question correctly—I have understood that the door has been found open in the mornings and unlocked.

Mr. Miller: I will object to that and ask the answer be stricken, your Honor. I think it is a conclusion and calls for——

The Court: Hearsay, I think. It may go out.

Q. (By Mr. Davis): Were you present on Saturday, November 28, when Mrs. Keene showed how to open that desk, how it could be opened without a key?

A. Yes, I was there.

Q. Did you see her open it without a key?

A. Yes.

Q. Did you ever see anyone opening the outside door when it was locked, without a key?

A. No, I haven't; I haven't personally, no.

Q. No. How about the rear door, had you ever seen anyone try to open that without a key? [156]

A. No, I haven't personally, no, sir.

Q. I see. A. No, sir.

Q. Now, Mr. Scott, did you take this money or any portion of it?

A. No, sir, I did not.

Q. Do you know who did?

A. I certainly do not, sir.

Q. Did you enter into any agreement or give any information to anyone else or enter into any conspiracy of any kind with anyone to take this money?

(Testimony of Homer W. Scott.)

A. No, sir, I certainly did not.

Q. Now, so far as the business that you were connected with in the selling of these tickets, if I understand correctly, the great portion of these people had purchased these tickets, left the airport on the day of the 25th of November, 1953, is that not correct, on Wednesday? A. That's right; that's right.

Q. Now, how many people were there in the way of maintenance men or others around the airport there that would be cognizant of the fact that such a large number of enlisted men or Marines were leaving on that day, be a substantial amount?

A. It could be a very substantial amount. To pin down to the exact number would be almost impossible. [157]

Q. But there was a substantial number of service men around that airport, those men would have to pay for those tickets that day in order to leave?

A. Yes, I would say.

Q. That was pay day as far as the Marine Corps was concerned? A. I would say so, yes.

Q. They could not get their money until that day in order to pay the balance owing on the tickets, is that correct? A. Yes, that is right.

Q. Prior to the time of this occurrence did you discharge any employee who had worked for the company on account of dishonesty?

A. I wouldn't say exactly dishonesty, but I did discharge a Mr. Paul Baker who at that time was employed as a janitor.

Q. Did he have a key?

(Testimony of Homer W. Scott.)

A. Yes, he had a key.

Q. He was a colored gentleman?

A. Yes, that's correct.

Q. And for what reason was he discharged?

A. Generally inefficient. He also did some of our baggage loading for us.

The Court: Did what?

The Witness: Baggage loading, loading the baggage on airplanes, and some of his characteristics were not what [158] I thought IMATA would like to have around. Between Mrs. Keene and myself, we agreed we should discharge him, or release him from the job.

Mr. Miller: I ask that the last part of that answer as to characteristics be stricken out, your Honor, as too vague.

The Court: I think it is harmless. He had some reason and he fired him. When was that?

Mr. Davis: I was going to ask that question.

Q. (By Mr. Davis): About what date was that?

A. Frankly, I can't be too accurate about that, but it was, I would say, in July sometime.

The Court: Six months before, six months before this?

The Witness: I would say so.

The Court: Before this occurrence.

The Witness: Yes. The IMATA records would show that from our pay records, I am pretty sure.

Q. (By Mr. Davis): Do you know whether he was still working in the vicinity of the airport after

(Testimony of Homer W. Scott.)

you discharged him? A. Yes, he was.

Q. As I understand these janitors were employed just an hour or two by your organization, and then they worked for various others?

A. Yes, that is right. [159]

Q. So that the fact that you discharged him didn't mean he didn't have other work in the vicinity? A. No, he was still around the airport.

Mr. Davis: I think that is all.

Cross-Examination

By Mr. Miller:

Q. How long, up to the time that you left IMATA, had you worked with Mrs. Keene?

A. You mean up until the time I left IMATA?

Q. Yes.

A. I worked with Mrs. Keene, I would say, for five years in the Bay Area.

Q. In other words, you worked the same place or worked with her for another employer before you went to IMATA, is that right?

A. Yes, that's right.

Q. Now, you have been in court and you heard Mr. Farquhar's testimony here today as to what took place on Wednesday night when the money was counted and put in the desk and locked up. Would you say that the testimony he gave was substantially what happened that night?

Mr. Davis: Pardon me, that is Friday?

Mr. Miller: No, Wednesday—Friday night, yes.

(Testimony of Homer W. Scott.)

The Witness: Yes, I would say.

Q. (By Mr. Miller): Those things substantially as [160] Mr. Farquhar described them?

A. Yes, I would say so; I would say so.

Q. So we don't need to go back over that in detail? A. Not necessarily.

Q. I understand that you left the office about 8:30 on Friday night, is that right, or sometime; maybe it was 8:00 o'clock, about 8:00 o'clock?

A. This was Friday night?

Q. Yes, Friday night.

A. Yes, I would say so.

Q. That is the night the money was left in the desk? A. Yes.

Q. And you went to the bar? A. Yes.

Q. With Mr. Farquhar? A. Yes.

Q. How many drinks did you have in the bar?

A. I really don't recall. I don't think I had more than two. I had a steak sandwich while I was there.

Q. Who left the bar first? You or Mr. Farquhar?

A. I believe I did.

Q. Where did you go when you left that bar that night? A. I went back to the office.

Q. You went back to the office?

A. Yes, sir. [161]

Q. And how long did you stay in the office?

A. I really don't know, sir. I really know I went back primarily to call Mrs. Scott to tell her I was on my way, on my way home, and I believe it has been established by the police that I made a call to Washington, D. C.

(Testimony of Homer W. Scott.)

Q. Yes, and who did you talk to in Washington, D. C.?

A. I don't know the person's name, but it was our operations' office.

Q. That was after you had left the office, gone to the bar, had something to drink and a steak sandwich?

A. Yes.

Q. Then you came back to the office and you called your wife and you called one of the operations, the operations manager for the company in Washington, D. C.?

A. Yes.

Q. And you can't fix the time of that call, approximately?

A. No, I can't, really.

Q. If I were to tell you that the telephone company records show that that call was made at ten minutes after nine, would you agree that that might have been the time?

A. If the telephone records are correct, I would have to agree that is the time.

Q. But that doesn't refresh your recollection so that you would remember that time?

A. No, it doesn't. [162]

Q. What time did you get home that night?

A. I got home at 10:00 o'clock, or just a little before 10:00.

Q. How do you fix that time?

A. Because I recollect getting home at the end of the "Our Miss Brooks" program.

Q. How many miles is it from the IMATA office at the airport to your home in Lafayette?

(Testimony of Homer W. Scott.)

A. I would say it is in the neighborhood of twenty miles.

Q. How long does it normally—would it normally take you to drive that distance?

A. About 45 minutes.

Q. And what were the weather conditions that night? Was it foggy?

A. Yes, I believe we had fog. However, I don't recall it hindering my driving, whatsoever.

Q. Didn't hinder your visibility around the airport, either, did it?

A. Not necessarily, as I recall.

Q. It might have hindered planes going in and out, but wouldn't interfere with visibility around the airport, see your way around the ground all right?

A. Yes, I believe so.

Q. When you left the office at somewhere—after you went back and somewhere around 9:00 or 9:10 at night, or [163] later, was both the back door and front door securely locked?

A. When I went back?

Q. When you left the office finally, after you went back?

A. Yes, I believe we determined that both back door and front door were secured.

Q. Were the windows securely latched?

A. That I can't say, really, because I don't know.

Q. Was there anyone with you at the office that night after you went back?

A. No, sir.

Q. You were all alone?

A. Right.

Q. Are you sure you didn't open the desk and

(Testimony of Homer W. Scott.)

take the cash box out? A. I am very sure, sir.

Q. You did not? A. I did not.

Q. How do you account for the fact that there were keys in the office to that cash box without your knowledge?

A. Those cash boxes and the handling of the keys were Mr. Farquhar's responsibility. He had been given the title as District Sales Manager and was given the responsibility to handle the common carriage job. The cash boxes were purchased by Mr. Farquhar; the securing of the keys and the taking care of those were his responsibility. [164]

Q. Now, going back to the time when Mr. Farquhar and you were in the office on Friday night before you went to the bar, did you have any drinks in the office that night?

A. I believe, yes, we had a drink at the office that night—that afternoon.

Q. About what time?

A. I really don't recall.

Q. Did you have more than one?

A. I don't think so.

Q. Where did you get the drink?

A. It was—a bottle was given to me by the operator of the gas station across the street.

Q. And you had that bottle in the office?

A. Yes.

Q. Where did you keep it?

A. In the file cabinet.

Q. And you recall at least taking one drink that night, but no more?

(Testimony of Homer W. Scott.)

A. You mean in the office?

Q. At the office.

A. At the office? I can't recall whether I had a drink at all that night, Mr. Miller, frankly.

Q. You recall pouring out drinks for yourself, Mrs. Keene and Mr. Farquhar? [165]

A. I do recall pouring out drinks, but I can't recall whether that day or night.

Q. You can't remember it was that day?

A. No.

Q. Now, referring back to Wednesday, the day before Thanksgiving, I just want to be sure of this. I understand that you talked by telephone to Mr. Roach and he told you how to handle the cash, to take it to the Western Union Telegraph Company and buy a money order, isn't that right?

A. Yes, that was one of the things.

Q. One of the instructions he gave you. You have already testified that you determined, you and Mrs. Keene, determined that the cost was too great for that. Can you remember what that cost was?

A. As I recall, it was in the neighborhood of \$40 to \$45, in that area, in that neighborhood.

Q. Cost of \$45. You then arranged with Mr. Herman, I think it is, to put the money in the Transocean safe?

A. I didn't, Mrs. Keene did.

Q. Mrs. Keene?

A. Mrs. Keene arranged for that.

Q. Can you tell us why you didn't put the money in the Transocean safe on Friday night?

(Testimony of Homer W. Scott.)

A. Mr. Herman was in the office that afternoon; I think he was leaving early, and the safe that we would want to [166] use, the one that he and one other person had the combination to, wouldn't be available to us.

Q. Isn't it a fact that he came in the office and told you that if you wanted to put the money in the safe, he was going to be back at 8:45 or 9:00 that night?

A. I don't recall that, Mr. Miller.

Q. You don't recall that?

A. No, sir, I don't.

Q. Now, you have testified that on Wednesday there were a large number of Marines moving out of there, a large number of people around and a number of people could have known that you had collected a large amount of money from these Marines. That is on Wednesday, the 25th. How many of those people you think would have known that you still had that large amount of money in the desk on the night of November 27, two days later?

A. I really can't answer that question, Mr. Miller. I don't know how many of them realized it.

Q. It wouldn't have been the same number that—who knew you had the money?

The Court: Well, I don't think—I know Counsel brought it out, but there is no use arguing with this witness. He doesn't know any more about that than you or I.

Mr. Miller: He testified to a large number of people who could have known on the 25th. [167]

(Testimony of Homer W. Scott.)

The Court: I wouldn't pay much attention to that testimony. What has that got to do with the case, how many people would know about it. It wouldn't help us in any way. A lot of people know there is a lot of money in the banks, but that wouldn't explain why some money is missing from the bank.

Q. (By Mr. Miller): How much money was put in the safe on Wednesday, do you know?

A. No, I don't.

The Court: There is no dispute about these matters. Nobody is arguing against the fact that there was about \$15,000 in this sack and that \$15,000 were counted out and went into the box. What happened beforehand as to the amount is really not of any consequence.

Mr. Miller: Your Honor, what I was getting at, I was wondering why the money hadn't been deposited in the bank sometime Friday.

The Court: That you may go into; that has been already testified to to some extent by the lady.

Mr. Miller: He was the man in charge.

Q. (By Mr. Miller): Could you tell me, Mr. Scott, why wasn't this money deposited in the bank on Friday during banking hours?

A. Primarily because we didn't get through with our—what we call our cash reports. Mrs. Keene was doing her [168] very level best to get them completed, and at the time the time element wasn't possible to deposit it.

Q. Couldn't you have counted out some fixed

(Testimony of Homer W. Scott.)

amount, or a large part of it and deposited that in the bank and still continue to make up the cash report?

A. That is right, we could have. However, it is usual procedure to keep cash on hand and make up your ticket reports to correspond with it.

Q. You counted this money on Friday night and to the best of your recollection about how much was there in currency? A. About \$15,000.

The Court: You have already covered this.

Mr. Miller: Not with this witness.

The Court: Yes, you asked him whether Mr. Farquhar's statement of it was substantially correct.

Mr. Miller: No further questions.

The Court: There is a matter I would like to inquire into, not quite clear to me.

You had a conversation with the New York office on this Friday evening when you went back. What was the nature of that conversation?

The Witness: Frankly, Judge, I don't recall, must have pertained to some inbound air carrier, or something about a move. [169]

The Court: You don't recall what that conversation was?

The Witness: No, sir, frankly I don't. However, I could——

The Court: The other matter I wanted to ask you about was this box that you had in which you put the money to which Mr. Farquhar had a key. Referring to that, you have stated you had addi-

(Testimony of Homer W. Scott.)

tional keys to this that were in the desk in the outer office that was open.

The Witness: Yes, as I recall after the robbery it was determined that there were other keys, too. I can't say definitely whether it was to that cash box, but there were other similar keys in the drawer.

The Court: Now, did you know beforehand that there were other keys which might have been, including the keys to this box, that were in the desk in the front office?

The Witness: No, sir. I can truthfully say I did not know.

The Court: You did not know about those keys at all?

The Witness: No, sir.

The Court: You know who put them there?

The Witness: No, sir, I don't know.

The Court: You really did not know whether included in those keys, then, were any additional keys to this strong box? [170]

The Witness: No, I can't say for sure, that's right.

The Court: As far as you know, then, at the time of these events the only person who had a key to it was Mr. Farquhar?

The Witness: That is correct, sir.

The Court: And the only person who had a key to the desk in which the box was contained was yourself?

The Witness: Myself, yes.

The Court: All right.

Mr. Miller: No further questions.

(Testimony of Homer W. Scott.)

Redirect Examination

By Mr. Davis:

Q. Mr. Scott, you were asked about the visibility on your drive home from the office to your home in Lafayette. As I understood you, you left the office some time—approximately 9:10 p.m.?

A. That apparently has been established by a phone call to——

Q. I mean shortly after, anyway. A. Yes.

Q. You arrived home a few minutes, you believe, before 10:00 p.m.?

A. Right at the end of the “Our Miss Brooks” program.

Q. You do not know anything about the visibility at the airport after then, say, 10:00 o’clock that night, until [171] morning?

A. No, not particularly.

Q. You spoke here about the gas station operator across the street. Tell us exactly, as you know it, where that gas station is located with reference to this office that you were occupying.

A. The gas station office, I would say, was directly across the street from the Terminal Building. The complete gas station would cover an area adjacent to the driveway into the entrance of the hangar in which the IMATA office is located. I would say that the distance from the gas station pump to the IMATA office would be 150 feet as a minimum.

(Testimony of Homer W. Scott.)

Q. Immediately across the street or road from the office that you were occupying is what?

A. It is a parking lot.

Q. Yes. And then adjoining that parking lot is what, in the direction towards the terminal?

A. Towards the terminal?

Q. Yes.

A. There is a—I don't think you can call it a road, or a drive, but there is a road through there, if you want to call it as such—goes out in back of the fence and back of the station, goes on out towards the airport road.

Q. Yes, and then adjoining that is the property that is [172] owned by the gas station, is that it?

A. Yes, yes.

Q. And is a portion of that property used for a parking area for the gas station?

A. That is the property—that is, it is leased or owned by the gas station.

Q. Yes.

A. I think, but has a parking lot for the airport, yes.

Q. I see. And then the pumps where the men in charge of the gas station would ordinarily be located is, as you recall it, almost directly across the street or road from the Terminal Building?

A. Yes, it would be. I would say the——

The Court: Counsel, we have gone into so much of this. Now, it isn't whether it is 50 or 150 or 175 feet, or whether it is diagonally across, it isn't of any great consequence.

(Testimony of Homer W. Scott.)

Mr. Davis: Well, they made so much out of it that this gas station operator hadn't noticed anybody around.

The Court: Maybe he didn't, so what? I don't think that is of any importance, either.

Mr. Davis: All right. I think that is all, Mr. Scott.

Mr. Miller: That is all, Mr. Scott.

(Witness excused.)

The Court: I wonder if you would recall Mrs. Keene [173] to make some inquiry about these keys that were in the desk. That has not been thoroughly covered.

EVELYN KEENE

a witness called in behalf of the Plaintiff, recalled by the Court and having been previously duly sworn, resumed the stand and testified further as follows:

The Court: Would you prefer I ask the question?

Mr. Miller: Yes, your Honor.

Mr. Davis: Go ahead.

The Court: Neither of you need to take the laboring oar in that regard.

Mr. Davis: You have in mind exactly what you want.

Examination by the Court

Q. Mrs. Keene, with reference to these keys that were in the desk that was open, did you put the keys

(Testimony of Evelyn Keene.)

there? A. No, sir, I didn't handle the keys.

Q. Do you know how they got into that desk?

A. No. I do know after the investigation it was found that there were spare keys in the extra desk.

Q. To your knowledge, then, that arose after this investigation or in the course of the investigation, afterwards? A. Yes. [174]

Q. Did you see this bunch of keys, yourself, do you remember?

A. I don't recall whether I had or not.

Q. You can't inform us as to precisely what these keys were for that were in this desk?

A. No, sir. But I do remember some conversation about them.

Q. You heard somebody else talking about. Now, don't tell me what they said, but who did you hear?

A. Mr. Farquhar.

Q. That is the extent of your knowledge about these keys? A. That's right.

The Court: I wonder if we might have Mr. Farquhar back on the stand.

(Witness excused.)

The Court: I hope you gentlemen don't mind my pursuing this a little bit.

Mr. Davis: Your Honor, this sort of becomes quite familiar to us. We have been over it so many times. It is better for you to pursue it. Things may seem very clear to us. [175]

ROBERT LEE FARQUHAR

a witness called in behalf of the Plaintiff, recalled by the Court and having been previously duly sworn, resumed the stand and testified further as follows:

Examination by the Court

Q. Now, did you, Mr. Farquhar, ever see a bunch of keys that were supposed to have been in this desk? A. Yes, sir.

Q. Before these incidents occurred?

A. Well, yes, sir. I can't recall exactly when, but I do remember purchasing the cash boxes.

Q. Doing what?

A. I bought—I was the one, as I say, that purchased the cash boxes.

Q. We hadn't heard that before. Did you buy the same particular cash box that was involved here?

A. Yes, sir.

Q. And where did you buy that?

A. At Associated Stationers in Oakland.

Q. Have you any idea about when you bought it?

A. No, I can't remember. I think—some two or three weeks, couldn't have been more than that. I had only been with them only about a month.

Q. What was the name of the concern? [176]

A. Associated Stationers.

Q. Where are they located?

A. I am not sure; it is downtown Oakland, I think about 17th.

Q. When you got the box, how many keys did they give you with the box?

(Testimony of Robert Lee Farquhar.)

A. I can't recall that.

Q. More than one?

A. Yes, at least two, yes, sir.

Q. When you brought the box back and was used and there was more than one key, now what became of those keys?

A. Well, now, I can't remember, but I could have—very possibly—put them in this top drawer.

Q. You kept one key for yourself?

A. Yes.

Q. You always had a key, yourself?

A. Yes, as a matter of fact, I have one now. If I remember correctly, the one key did fit several different cash boxes. I bought the cash boxes because of the fact that I thought—

Q. You are getting a little bit ahead of me, now. When you bought the cash box that is the subject matter of this inquiry, at that time did you buy more than one cash box?

A. I can't remember whether I did, but—

Q. Well, did you buy at any time more cash boxes than [177] the one that is the subject of this inquiry?

A. Oh, yes.

Q. At a different time?

A. I don't remember whether it was a different time or the same time.

Q. How many do you remember that you bought?

A. Well, now, I remember the large one, they came in different sizes—

Q. I am just trying to find out—

(Testimony of Robert Lee Farquhar.)

A. I can't remember, sir.

Q. You think it was more than one?

A. I think so, yes, sir.

Q. So therefore you must have gotten more than two keys? A. Yes, sir.

Q. You got other keys, additional keys for the other box or boxes that you bought?

A. Yes, sir.

Q. And what became of those keys?

A. The individual at Treasure Island, Miss Ferris would have one.

Q. Some of these boxes are used at other places?

A. Yes, yes.

Q. But only used the one box at the airport in Oakland? A. Yes, sir, uh-huh.

Q. And for that box there was at least two keys, of which [178] you had one. What did you do with the other one, the other key?

A. I can't remember, but I must have put it in the top drawer of that small desk that we are talking about.

Q. Why would you do that? Here is a key to a box that contains valuables; you keep one yourself and put one in a desk that is open to anybody.

A. Well, as I say——

Q. I am not saying there is particularly anything wrong, just trying to find out what was the reason for doing it.

A. As I say, I didn't think of this particular type of cash box as being a security measure; it was a very convenient way to handle cash and to make

(Testimony of Robert Lee Farquhar.)

change. I do know that one key will fit several different boxes.

Q. You are sure of that, now, the different boxes you had could all be opened by the same key?

A. Yes, we tried that after the loss.

Q. Used the key—that one key fitted several boxes? A. Yes, sir.

Q. Do you know whether or not at the time on or about that Friday there was an additional key for one of the boxes in this front desk?

A. No, I didn't remember putting it there, no.

Q. You don't remember putting it there?

A. No, I don't remember putting it there, [179] sir.

Q. Well, Mrs. Keene says that she heard you talking about the fact that the keys were in this drawer. Do you recall having talked about the fact that there was—— A. After the loss?

Q. Yes. A. Yes.

Q. After the loss you decided that you put the key, extra key——

A. Right now, no, sir, I can't remember when I put them in, but I can say that it was possible that I did because I purchased the cash boxes.

Q. Did Mr. Scott have a key to the cash box?

A. Not to my knowledge, no.

The Court: Well, I think I have pursued this examination as long as I want. Anything you gentlemen want to ask?

Mr. Davis: I don't have anything.

Mr. Miller: I think not.

(Testimony of Robert Lee Farquhar.)

The Court: How about you, Mr. Davis?

Mr. Davis: That is all.

The Court: Any other witnesses?

Mr. Davis: If I could have one minute.

The Court: Oh, certainly. You wish me to take a recess? I will be glad to take a five-minute recess if you wish to consult. [180]

(Short recess.)

The Court: Any more witnesses?

Mr. Davis: No, the defendant rests.

The Court: Both sides finished?

Mr. Miller: Both sides.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 180 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ R. D. NORTON.

[Endoresd]: Filed July 29, 1955. [180-A]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of Cali-

ifornia, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Complaint with appendix attached.

Notice of motion to dismiss and in the alternative to strike with pts. and authorities attached.

Order denying motion to dismiss or in the alternative to strike.

Answer.

Memorandum and order for judgment.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal filed June 28, 1955.

Supersedeas bond.

Designation of record on appeal by appellant.

One volume of Reporter's transcript of trial.

Plaintiff Exhibit No. 1.

Defendant Exhibit A.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 29th day of July, 1955.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14847. United States Court of Appeals for the Ninth Circuit. General Accident, Fire and Life Assurance Corp., Limited, a Corporation, Appellant, vs. Independent Military Air Transport Association, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 29, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14847

GENERAL ACCIDENT, FIRE AND LIFE AS-
SURANCE CORPORATION, LIMITED, a
Corporation,

Appellant,

vs.

INDEPENDENT MILITARY AIR TRANS-
PORT ASSOCIATION, a Corporation,

Respondent.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON APPEAL

The Appellant will rely upon the following points
in connection with the appeal in the above case:

That Finding V of the Findings of Fact and Con-
clusions of Law, namely: "The said loss was alleged
by plaintiff to be and the evidence adduced reason-
ably establishes that it was due to the dishonesty of
one or more of plaintiff's employees, rather than to
the act of a stranger," is not supported by the evi-
dence and is contrary to the evidence in this case.

That there is no evidence proving or tending to
prove that the loss sustained by the Plaintiff and
Respondent was caused by any dishonest act com-
mitted by any one or more of the employees of the
Plaintiff and Respondent.

That there is not sufficient evidence in this case to overcome the presumption that the employees of the Plaintiff and Respondent were innocent of crime. That the Plaintiff and Respondent did not sustain the burden of showing that the loss occurred as a result of one of the risks insured against under the policy.

That there is attached hereto a copy of Designation by Appellant of What to Be Included in Record on Appeal, which designation was filed with the Clerk of the District Court on June 28, 1955.

The designation of a portion of the record which the Appellant desires to have printed is as stated therein.

/s/ THOMAS E. DAVIS,
Attorney for Appellant.

[Endorsed]: Filed September 1, 1955.

No. 14,847

IN THE

United States Court of Appeals
For the Ninth Circuit

GENERAL ACCIDENT, FIRE AND LIFE AS-
SURANCE CORP., LIMITED, a Corpora-
tion,

Appellant,

vs.

INDEPENDENT MILITARY AIR TRANSPORT
ASSOCIATION, a Corporation,

Appellee.

BRIEF FOR APPELLANT.

THOMAS E. DAVIS,

405 Montgomery Street, San Francisco 4, California,

Attorney for Appellant.

FILED

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U.S. COURT OF APPEALS
NINTH CIRCUIT



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No. 14,847

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GENERAL ACCIDENT, FIRE AND LIFE AS-
SURANCE CORP., LIMITED, a Corpora-
tion,

Appellant,

vs.

INDEPENDENT MILITARY AIR TRANSPORT
ASSOCIATION, a Corporation,

Appellee.

BRIEF FOR APPELLANT.

The appeal is by the defendant from an adverse judgment in a noninjury action for \$15,728.57 on a policy of fidelity insurance.

STATEMENT OF JURISDICTION.

The complaint in the District Court alleged that plaintiff was incorporated under the laws of the State of Delaware, and that the defendant was incorporated under the laws of the Kingdom of Great Britain. R. 3. The action was of a civil nature, and the matter

in controversy exceeded the sum or value of \$3000 exclusive of interest and costs. R. 3-6. These allegations were admitted by the answer. R. 24. The District Court found them true. R. 27. Jurisdiction of the District Court is therefore sustained by 28 U.S.C., §1332.

The final judgment of the District Court was entered against appellant on June 17, 1955. R. 31-32. Notice of appeal therefrom was filed June 28, 1955. R. 32. The appeal was timely taken (R. 32) and timely docketed (R. 192). Rules of Civil Procedure, Rule 73 (a) (g). Jurisdiction of this court to review the judgment of the District Court is therefore sustained by 28 U.S.C., §§1291, 1294.

STATEMENT OF THE CASE.

The complaint alleged that defendant, as insurer, had issued a policy of fidelity insurance to plaintiff, as insured, indemnifying plaintiff up to \$50,000 against loss caused by fraudulent or dishonest acts of its employees (R. 3-4), and also providing (R. 4):

“If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the Employees and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agreement, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the fraud or dishonesty of any one or more of the said

Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the Limit of Liability applicable to this Insuring Agreement 1.”

The complaint alleged due performance by plaintiff (R. 5), loss to plaintiff on or about November 27 or 28, 1953, of the sum of \$15,728.57 “from a cash box in a drawer of a desk of an office occupied and used by plaintiff and its employees at the Oakland Municipal Airport in the City of Oakland, County of Alameda, State of California, being one of the premises specifically covered by said policy” and allegedly caused by fraud, dishonesty, or theft of one or more of plaintiff’s employees (R. 5), and nonperformance by defendant (R. 6).

At the trial, the issues were “narrowed to two things, the amount of the loss and whether or not the loss was covered by the insurance policy”. (R. 34.) On this appeal, the amount of the loss is not in dispute. The vital concern here is the court’s Finding of Fact V (R. 29) and the legal consequences flowing therefrom, namely, the conclusion of law that plaintiff was entitled to judgment in the sum of \$15,728.57, interest and costs (R. 30), and the resulting judgment in that sum (R. 31-32). Finding of Fact V was as follows (R. 29):

“The said loss was alleged by plaintiff to be and the evidence adduced reasonably establishes that it was due to the dishonesty of one or more of plaintiff’s employees rather than to the act of a stranger.”

Plaintiff was in the business of air transportation. (R. 40.) It transported military personnel under government contract, and it also transported individual members of the military personnel under private contracts. (R. 40.) One of its offices was at the Oakland Municipal Airport in Alameda County. Moneys belonging to plaintiff and stolen from this office on the night of November 27, 1953, or the morning of November 28, 1953, gave rise to the present action.

Plaintiff's western regional manager at the Oakland Airport was Homer W. Scott (R. 162-163) and 7 or 8 employees of plaintiff worked under him (R. 46). Three of these had headquarters at the airport. One was Robert Lee Farquhar. His "main job" was to sell tickets and collect cash from individual passengers with whom plaintiff made private contracts for transportation. (R. 46.) Another was Mrs. Evelyn Keene. She was Scott's office assistant and secretary. (R. 78.) A third was Richard B. Held. He worked on the operation end and met inbound and loaded outbound aircraft. (R. 148.) All had keys to the office. (R. 75, 148.) Four other employees had headquarters away from the airport. (R. 65.) Janitorial work was done by Howard Pitts, who worked part time. (R. 60.)

The office was a two-room, lean-to affair divided by a glass paneled partition. (R. 54, 112.) The room known as the outside office opened onto a street. (R. 54.) A parking lot, always open to the public, was across the street. (R. 157, 183.) Two desks were located in the outside office. (R. 55.) There was evidence

that the front door, which opened into the outside office, could be opened without a key. (R. 93-94.) The room known as the inside office opened into a hangar always open to the public. (R. 54, 111-112.) Manager Scott occupied this office and it contained a single desk. (R. 55.) The back door leading from the inside office into the hangar was equipped with a bolt that went into a wooden slot that "had been sort of gnawed away". (R. 110.)

Sale of air transportation tickets to individual members of the military personnel occurred at Treasure Island or other points away from the Oakland Airport, and for convenience in handling moneys thus received, and not as a security measure, Farquhar, the District Sales Manager, had acquired on behalf of plaintiff a number of portable metal cash boxes. (R. 176, 186.) Two keys came with each box and keys were interchangeable—the key to one box would open all boxes of varying sizes. (R. 187-188.) One of these cash boxes was used in connection with the Oakland Airport office. (R. 188.) Farquhar kept one of the keys thereto, and the other was placed in a desk in the outside office. (R. 188.) Scott did not have a key to the box. (R. 189.)

A few days before Thanksgiving of 1953, a group of about 2000 Marines arrived at Treasure Island for reassignment and discharge. (R. 47.) In the sale of air transportation tickets to members of this group at Treasure Island, Farquhar used the cash box in receiving moneys, making change, and making refunds. (R. 47.) By Wednesday, November 25, 1953, a

sum of \$15,000 or so had accumulated in a canvas bag into which the cash box had been emptied. (R. 47-51.) On the night of Wednesday, November 25, 1953, Scott and Mrs. Keene placed this canvas bag in the safe of the nearby Transoceanic Air Line. (R. 80-81.) It was put there to save expense, although the Washington office of the plaintiff had instructed Scott to wire the money to Washington by Western Union. (R. 165-166.)

Mrs. Keene obtained the money from the Transoceanic Air Line on the morning of Friday, November 27, 1953, and brought it to Scott at the office of plaintiff. (R. 85-86.) Checking ticket sales against the money began. (R. 85-86.) Counting of the money was by Scott and Farquhar. (R. 86.) Counting was still in progress when Mrs. Keene left the office around 7 p.m. and was not completed until after 8 p.m., when the money was placed in the cash box and the box locked. (R. 55-56, 167.) Conditions made it impracticable to again place the money in Transoceanic's safe. (R. 177-178.) Accordingly, the locked cash box was placed in a drawer of Scott's desk, and the drawer locked. (R. 56, 167.) Scott had a key to the desk but no key to the box, and Farquhar had a key to the box but no key to the desk. (R. 167.) Scott and Farquhar then left the office, but Scott returned to the office later and made telephone calls to his wife and to the Washington office of plaintiff. (R. 173-174.) There was evidence that the drawer of the desk could be opened without use of a key. (R. 92-93.) When the box was removed from the drawer of the desk on the morning of Saturday, November 28, 1953, and unlocked and

opened in the presence of Scott, Mrs. Keene, Farquhar, and Held it was empty as to currency. (R. 64, 90-92.) Scott, Mrs. Keene, Farquhar, and Held each denied taking the money or participating in the taking of it. (R. 169-170, 75, 104-105, 153.)

On the morning of November 28, 1953, one of the windows of the office was found unlatched. (R. 59.) Investigation by police officers after the theft disclosed no evidence of forcible entry to the premises, doors, windows, desks, or cash box. (R. 113-126, 131-137.) On frequent occasions before the theft the doors of the office, front and back, were found open when employees came to work. (R. 110-111.) In general, thefts at the Oakland Airport were not uncommon. (R. 155-159.) Keys to the premises were possessed by employees who had been discharged by plaintiff. (R. 109-110, 170-171.)

SPECIFICATION OF ERRORS.

1. The District Court erred in finding that "The said loss was alleged by plaintiff to be and the evidence adduced reasonably establishes that it was due to the dishonesty of one or more of plaintiff's employees, rather than to the act of a stranger", for the reason that the finding is clearly erroneous, the evidence is insufficient to support it, and the finding is contrary to the evidence and the law.

2. The District Court erred in concluding as a matter of law that plaintiff was entitled to judgment against defendant for any sum or sums.

3. The District Court erred in entering judgment against defendant for any sum or sums.

ARGUMENT.

1. SUMMARY OF ARGUMENT.

The judgment against defendant depends upon the soundness of Finding of Fact V. That finding is clearly erroneous. It rests entirely on speculation and conjecture. The evidence is not susceptible to a reasonable inference that plaintiff's loss was due to the dishonesty of one or more of its employees. The finding is defeated by the presumption that plaintiff's employees were innocent of crime or wrong. The judgment therefore lacks evidentiary support and should be reversed.

2. THE JUDGMENT AGAINST DEFENDANT SHOULD BE REVERSED FOR THE REASON THAT IT LACKS EVIDENTIARY SUPPORT. (Specification of Errors, Nos. 1, 2, 3.)

It is obvious that the vitality of the judgment for plaintiff depends upon the vitality of the finding to the effect that plaintiff's loss was caused by dishonesty of one or more of its employees. Each employee who was in any way connected with the moneys claimed to have been lost testified unequivocally that he or she was not guilty of any dishonesty. That testimony is fortified by the strongest of all rebuttable presumptions, namely, that a person is innocent of crime or wrong. (Calif. Code. Civ. Proc., §1963 (1); *Estate of*

Nelson, 191 Cal. 280, 284, 216 P. 368; *Drown v. New Amsterdam Casualty Co.*, 175 Cal. 21, 23, 165 P. 5; *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 308, 95 P. 2d 491.)

Whether an inference to the contrary may be drawn from the evidence is, of course, a question of law. (*Blank v. Coffin*, 20 Cal. 2d 457, 461, 126 P. 2d 868.) Circumstantial evidence will not permit such contrary inference in the present case, for as said in *Dobson v. Ind. Acc. Com.*, 114 Cal. App. 2d 782, 786, 251 P. 2d 349:

“But to say that circumstantial evidence is consistent with a number of hypotheses, including that contended for by the party relying upon such evidence is not to say that it would support a finding of the truth of the hypothesis necessary to establish liability. We think that all that can be said in respect to this situation is that it furnished no more than a basis for speculation as to whether or not, by reason of the irregular driving pattern observed by the officer witness, *Dobson* might have been intoxicated. We think the case comes within the rule declared in *Reese v. Smith*, 9 Cal. 2d 324, 328, 70 P. 2d 933, that if the existence of an essential fact upon which a party relies is left in doubt or uncertainty the party upon whom the burden rests to establish that fact must offer proof, and not his adversary; that a judgment should not be based on guesses or conjectures and that a finding of fact must be an inference drawn from evidence rather than a mere speculation as to probabilities without evidence.” (See, also, *McKellar v. Pendergast*, 68 Cal. App. 2d 485, 489, 156 P. 2d 950.)

Finding V is clearly erroneous and should therefore be set aside (Rule 52 (a), Rules of Civil Procedure), and since the vitality of the judgment depends upon the vitality of that finding the judgment in turn should be reversed.

CONCLUSION.

Appellant respectfully submits that the judgment appealed from should be reversed with directions to the trial court to enter judgment for appellant.

Dated, San Francisco, California,
January 16, 1956.

THOMAS E. DAVIS,
Attorney for Appellant.

No. 14,847

In the

United States Court of Appeals

For the Ninth Circuit

GENERAL ACCIDENT, FIRE AND LIFE ASSUR-
ANCE CORP., LIMITED, a CORPORATION,

Appellant,

VS.

INDEPENDENT MILITARY AIR TRANSPORT AS-
SOCIATION, a CORPORATION,

Appellee.

Brief for Appellee

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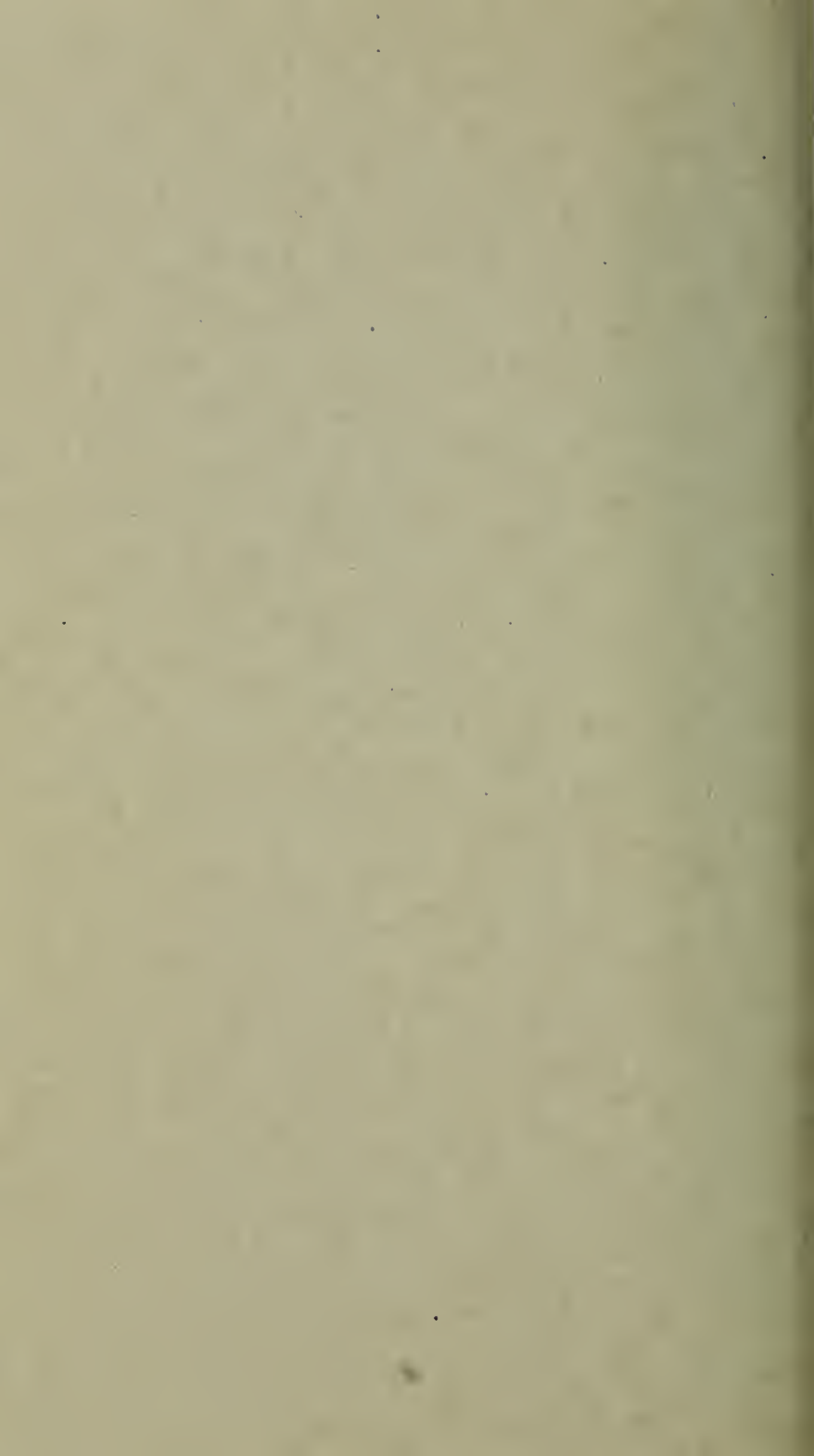
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In the
United States Court of Appeals
For the Ninth Circuit

GENERAL ACCIDENT, FIRE AND LIFE ASSUR-
ANCE CORP., LIMITED, a CORPORATION,

Appellant,

vs.

INDEPENDENT MILITARY AIR TRANSPORT AS-
SOCIATION, a CORPORATION,

Appellee.

Brief for Appellee

STATEMENT OF JURISDICTION

This appeal is from a judgment of the District Court for the Northern District of California in a civil action between a resident of the State of Delaware and a resident of the Kingdom of Great Britain. The matter in controversy exceeded the sum of value of \$3,000, exclusive of interest and costs. (R. 3-6) These allegations were admitted by the answer. (R. 24) The District Court found them to be true. (R. 27) Jurisdiction of the District Court is therefore sustained by 28 U.S.C. § 1332.

The appellee admits that the appeal was timely taken and timely docketed. *Rules of Civil Procedure*, Rule 73(a), (g). Jurisdiction of this court is therefore sustained. (28 U.S.C. §§ 1291, 1294).

STATEMENT OF THE CASE

1. Nature of the Action.

Appellee obtained a judgment for \$15,728.57 against appellant in the District Court, sitting without a jury, in an action on a policy of fidelity insurance issued to appellee by appellant which insured appellee, to a limit of \$50,000, against loss caused by the fraud or dishonesty of one or more of appellee's employees.

2. The Issue.

At the trial the issues were narrowed to the amount of loss and whether or not the loss was covered by the policy of insurance. (R. 34) The amount of the loss was established at the trial by direct and undisputed evidence at \$15,728.57 and is not in dispute on this appeal (App. Br. 3). At the trial it likewise developed there was no dispute as to the fact that the loss was caused by the fraud or dishonesty of someone. The question before the trial court was only as to who participated in the fraud or dishonest act.

The only issue raised by appellant on this appeal is whether there is sufficient evidence to support one finding of the trial court, to-wit:

“The said loss was alleged by plaintiff to be and the evidence adduced reasonably establishes that it was due to the dishonesty of one or more of plaintiff's employees rather than to the act of a stranger.” (R. 29)

3. The Facts.

It is necessary for appellee to restate the pertinent facts. Appellant's statement of the facts left out many of the significant facts. Furthermore, appellant ignored the settled principles of law that in an appeal all conflicts in the evidence are deemed to have been resolved in favor of the prevailing party and that such party is given the benefit of every favorable inference that may reasonably be drawn from the evidence adduced.

The policy of fidelity insurance issued by the appellant, obligated the latter to indemnify appellee for loss:

"Through any fraudulent or dishonest act or acts, committed anywhere by any of the Employees acting alone or in collusion with others, including loss of Money and Securities and other property through any such act or acts of any of the Employees, and including that part of any inventory shortage which the Assured shall conclusively prove to have been caused by the fraud or dishonesty of any of the Employees, the amount of insurance on each of such Employees being the Limit of Liability applicable to this Insuring Agreement 1."

By said policy defendant further agreed:

"If a loss is alleged to have been caused by the fraud or dishonesty of any one or more of the Employees and the Assured shall be unable to designate the specific Employee or Employees causing such loss, the Assured shall nevertheless have the benefit of this Insuring Agreement, provided that the evidence submitted reasonably (in case of inventory shortage, conclusively) establishes that the loss was in fact due to the fraud or dishonesty of one or more of the said Employees, and provided further that the aggregate liability of the Company for any such loss shall not exceed the Limit of

Liability applicable to this Insuring Agreement 1.” (R. 4)

One of the premises covered under this policy is the Oakland office of appellee, a small completely enclosed metal building located near the administration building at the Oakland Municipal Airport in the City of Oakland, Alameda County, California. (R. 5, 139) It is partitioned into two rooms by means of a wall, the lower three and a half feet of which is wood and the remainder glass. (R. 137-138) The front of the building is of similar construction. (R. 138) When lighted the rear office, including the desk hereinafter referred to, is plainly visible from the street outside. (R. 135-137) Across the street from the office, at a distance of about 75 feet, is an all night gas station and parking lot, the lights from which illuminate the area in front of the office. (R. 155, 161) The rear of the building opens into a hangar. The airport premises around the office are regularly patrolled by airport guards. (R. 129-130)

There were four full time employees at appellee's Oakland office at the time of the loss. In charge was Homer Scott, appellee's Western Regional Manager. (R. 163) Scott's immediate assistant and secretary was Evelyn Keene who had worked with Scott prior to their being employed by appellee. (R. 78, 172) The third, Robert Lee Farquhar, sold tickets and collected cash from military personnel purchasing air transportation. (R. 46) The fourth was Richard B. Held whose principal duties were the meeting of inbound and loading of outbound aircraft but who also did sales work. (R. 148) A part time employee, Harold Pitts, did the janitorial work at the office every morning between 5 and 7. (R. 60) All of these employees had keys to the office. (R. 75, 88, 148, 174)

There were three other employes working at nearby military installations, another at Monterey, and a fifth at San Diego. (R. 65)

On Wednesday, November 25, 1953, appellee's office in Oakland had collected over \$15,000 in currency from the sale of airplane tickets to military personnel on Treasure Island. (R. 48-49) Scott was instructed over the telephone by Francis J. Roach, appellee's comptroller in Washington, D. C., to purchase a Western Union money order with this money because the Oakland office had no safe place to keep such a substantial sum. (R. 38-39, 164-166) In spite of these specific instructions this action was not taken. Instead, the money was placed in a safe at a nearby office of Transocean Air Lines and a receipt for the amount was obtained. (R. 80-82) The only explanation offered for this failure to obey the instructions was that Evelyn Keene felt that the cost of obtaining the money order was excessive and Scott, for some unexplained reason, respected Mrs. Keene's judgment more than that of his superior. (R. 78, 83-84, 166, 172)

Thursday, November 26, 1953, was Thanksgiving Day and the money remained in the Transocean safe until Friday morning, November 27th. (R. 85) Prior to its being placed in the safe, the money had been counted as the exact amount had to be ascertained before a money order could be obtained. (R. 108) On Friday no steps were taken to deposit the money in the bank. (R. 87) Mrs. Keene, who made deposits for appellee from time to time, testified that the money was still being counted early in the evening and she had no idea that the banks were open until 6 on Friday. (R. 87, 99) Scott, when asked why they didn't count some fixed amount and deposit it, offered only the following explanation: "That is right, we could have. However, it is usual

procedure to keep cash on hand and make up your ticket reports to correspond to it." (R. 180)

About 7 o'clock on Friday evening, November 27, Mrs. Keene left the office, leaving Scott and Farquhar with the money. (R. 88) According to Scott the Transocean safe was not available to him that evening. (R. 178) The Western Union office, however, was open. (R. 98) Farquhar suggested that the money be placed in the safe of the gas station across the street. Finally the money was locked in a metal cash box and placed in Scott's desk in the rear room and the desk was also locked. (R. 58, 167) Scott had the only key to the desk. (R. 56) The desk, however, could be opened without a key. (R. 73, 93, 169) Farquhar had a key to the cash box and Ferris who worked for appellee at Treasure Island had another key. (R. 188) There was at least one other key in the drawer of an unlocked desk in the front office. (R. 188) Farquhar and Scott then locked the front and rear doors, leaving the lights on, and left the office between 7:30 and 8:00 o'clock. (R. 58-59, 167)

Scott and Farquhar went to the airport bar and had several drinks. Farquhar left the bar about 8:45. (R. 61) Scott left the bar about 8:30 and returned to the office. Scott testified that he called his wife from the office to let her know he was on his way home. (R. 173) Although Scott had no recollection of the matter, it was later established by the police that he also placed a call to Washington, D. C. at 9:10. (R. 173-174) Scott apparently left the office soon thereafter and drove to his home in Lafayette about 20 miles away, arriving shortly before 10 P.M. At the time he left the doors were locked. (R. 173-175)

On Saturday morning Mrs. Keene arrived at the office between 8 and 8:30. She found the front door locked and the

rear door bolted. (R. 88) She observed nothing out of place and saw no signs of any forcible entry either of the building or Scott's desk. (R. 88-89) Scott arrived soon thereafter. (R. 89) He gave Mrs. Keene the keys to his desk and asked her to see if the cash box was still in his desk. (R. 90) This was the only time Mrs. Keene remembered his requesting her to do this. (R. 91) She ascertained that the box was still there, locked the desk again without taking the cash box out, and returned the keys. (R. 90) About 10:30 Mrs. Keene called Farquhar who lived in Berkeley, a considerable distance from the Oakland airport, and asked him to come to the office to pick her up and take her to the bank. (R. 62, 89) While Farquhar was en route, Mrs. Keene for the first time decided to check to see if the bank was open on Saturday and found that it was not. (R. 62, 96-97)

Held arrived at about 11:00 o'clock and Farquhar reached the office at approximately 11:30. (R. 62) At 12:30 it was decided to count the cash *again* and Scott gave Farquhar his key to the desk. Farquhar unlocked the desk, took out the cash box, opened it in the presence of Scott, Keene and Held and found the currency missing. Coin, checks and money orders remained in the box. (R. 63-64) At this moment Scott turned grey. (R. 92)

Subsequently the disappearance of the money was investigated by the Grand Theft Detail of the Oakland Police Department. This investigation revealed that, although one window in the building was not latched, the presence of undisturbed dust in the area made it clear that no entry had been made through the window. (R. 123) The investigation also confirmed the fact that no forcible entry of the premises, the desk or the box had been made. (R. 122-123, 133-135) Experts in the police department tried to open the cash box without a key but failed to do so. (R. 122, 128-129)

As a result of their investigation, Inspectors Mallon and Gustavson of the Oakland Police Department concluded that the rear door could not be opened from outside without breaking it. (R. 121, 127) It was difficult to open even with the bolt drawn. (R. 133) No contradictory evidence was given.

The inspectors similarly concluded that it would be impossible to open the front door without a key. (R. 118, 132-133) Farquhar testified he once had to break a window when he forgot his key. (R. 72) Mrs. Keene testified she had a similar experience. (R. 95) There was other evidence to the effect that the front door could be opened with a plastic card. (R. 94, 150-151)

ARGUMENT

1. Summary of Argument.

The trial court properly found that one or more of plaintiff's employees participated in the theft causing the loss.

This court should not reverse the trial court unless it is convinced that the finding of the trial court is clearly erroneous.

Appellee is entitled to rely on circumstantial evidence and need only show that it is more probable than not that the loss was caused by the fraud or dishonesty of one or more of its employees acting alone or in collusion with others.

Appellee established by the preponderance of the evidence that the loss was covered by the Policy.

2. Scope of Review.

On appeal the findings of the trial court are presumed to be correct and may not be set aside unless clearly erroneous. Rule 52 (a), *Federal Rules of Civil Procedure*; *California Motor Transp. Co. v. Fidelity & Casualty Co.* (9th

Cir. 1951), 192 F.2d 640, 643. In considering whether the trial court's findings are clearly erroneous appellee must be given the benefit of all favorable inferences which may reasonably be drawn from the evidence. *Lassater v. Guy F. Atkinson Co.* (9th Cir. 1949), 176 F.2d 984; *Skelly Oil Co. v. Holloway* (8th Cir. 1948), 171 F.2d 670, 674.

That the trial court could have viewed the facts differently or that this court might have done so if it had been the initial trier of fact does not mean that the trial court's finding is clearly erroneous. If reasonable men may draw different inferences from the evidence adduced, this court should not substitute its judgment for that of the trial court. *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-342; *Shoso Nii v. Brownell* (9th Cir. 1953), 206 F.2d 895, 897.

3. Rules Governing the Evidence.

By the specific provisions of the policy appellee is entitled to recover thereunder if "the evidence submitted reasonably * * * establishes that the loss was in fact due to the fraud or dishonesty" of one or more of its employes "acting alone or in collusion with others". (R. 4) Applying the rule that any doubts as to the meaning of an insurance contract will be resolved against the insurer, *Bankers Life Co. v. Jacoby*, (9th Cir. 1951), 192 F.2d 1011, 1014, the contract here seems to impose a lesser burden on plaintiff than the ordinary "preponderance of the evidence rule". However, in this case the trial court required appellee to prove its case by a preponderance of the evidence. (R. 124) We submit that on the basis of the language of the insurance contract this court may sustain the judgment on the ground that appellee fully met the requirements of the insurance policy.

In any event appellee is certainly entitled to recover if the evidence submitted establishes, by the preponderance there-

of, that the loss was due to the fraud or dishonesty of one or more of its employes acting alone or in collusion with others, and this is so even though a fraudulent, dishonest or criminal act is involved. *Linnell v. Landon & Lancashire Indemnity Co.* (1946), 74 N.D. 379, 22 N.W. 2d 203; *Farmers' Produce Co. v. Aetna Casualty & Surety Co.* (1927), 238 Mich. 405, 213 N.W. 685; 46 *C.J.S. Insurance, Section 1359b*, p. 562; 21 *Appleman, Insurance Law and Practice, Section 12774*, p. 466; cf. *Buxton v. International Indemnity Co.* (1920), 47 Cal. App. 583, 593, 191 Pac. 84 (rule applied in action to recover under policy of automobile insurance against theft.)

It is also the rule in this type of action that the essential facts may be established by circumstantial evidence. *Gaytime Frock Co. v. Liberty Mut. Ins. Co.* (7th Cir. 1945), 148 F2d 694; *Farmers' Produce Co. v. Aetna Casualty & Surety Co.* (1927), 238 Mich. 405, 213 N.W. 685; 21 *Appleman, Insurance Law and Practice, Section 12774*, p. 466. In fact, recovery has been awarded on circumstantial evidence where the policy required "direct and affirmative" evidence. *Miller v. Massachusetts Bonding & Ins. Co.* (1915), 247 Pa. 182, 93 Atl. 320. There is a split of authority on the requisite nature of such evidence. Some courts hold that the circumstantial evidence must be such that it fairly and reasonably excludes any other explanation than the existence of the fact or the occurrence of the event which is essential to plaintiff's recovery, that is to say, that such existence or occurrence must be the only conclusion that can fairly or reasonably be drawn.

Among the cases so holding are *Gaytime Frock Co. v. Liberty Mutual Ins. Co.*, *supra*, and *Phipps v. American Employers' Ins. Co. of Boston, Mass.* (1935), 118 Pa. Super. 133, 179 Atl. 816.

Other courts hold that it is sufficient for the party having the burden of proof to make out the more probable hypothesis and that the evidence need not rise to that degree of certainty which will exclude every other reasonable inference. See e.g. *National Shirt & Hat Shops v. American Motor Ins. Co.* (1952), 234 N.C. 698, 68 S.E. 2d 824, 830-1. This view appears to be the preferable one since the other in effect requires proof beyond a reasonable doubt. *Northwest States Utilities Co. v. Ashton* (1937), 50 Wyo. 168, 65 P.2d 235, 239 rehearing denied 51 Wyo. 132, 69 P.2d 623.

The California rule is determinative in this case. The jurisdiction of the Court below is founded upon the diversity of citizenship existing between the parties. In this situation under the rule of *Erie Railroad Co. v. Tomkins*, 304 U.S. 64, the California law on the subject governs. *Fegles Const. Co. v. McLaughlin Const. Co.* (9th Cir. 1953), 205 F.2d 637, 639 n. 1. It is the rule of the California cases that a theory may be established by circumstantial evidence where such evidence shows that the theory is more probable than any other; such evidence need not reasonably exclude all other theories. *Barham v. Widing* (1930), 210 Cal. 206, 215, 291 Pac. 173; *Sanders v. MacFarlane's Candies* (1953), 119 C.A. 2d 497, 500, 259 P.2d 1010; *Vaccarezza v. Sanguinetti* (1945), 71 C.A. 2d 687, 691, 163 P.2d 470.

The rule of those cases that require that the circumstantial evidence exclude any other explanation is therefore inapplicable to the case at bar. This does not mean, of course, that a finding based on guesses or conjectures (such as that reversed in *Dobson v. Ind. Acc. Com.*, 114 C.A. 2d 782, 251 P.2d 349, cited by appellant) will be sustained. As we will show below, the inference accepted by the trial court is not only the more probable but is the only reasonable inference to be drawn from the evidence.

4. The Evidence Adduced at the Trial.

Appellee established by direct and uncontroverted evidence that it had suffered a loss of \$15,728.57. The circumstances were such that no inference could reasonably be drawn other than that such loss was due to an act of fraud or dishonesty of some person or persons. This is not disputed by appellant. The money must, therefore, have been lost either (1) through the fraud or dishonesty of one or more employes of appellee (acting alone or in collusion with others) or (2) through the fraud or dishonesty of one or more persons not employed by appellee (and not acting in collusion with any employe or employes).¹

Pursuant to the applicable rules of evidence heretofore stated and discussed, the trial court had only to determine which of the two alternatives was the more probable.

We submit that examination of the evidence shows that the trial court was justified in concluding that the first alternative was the more probable. It must be taken as established by the evidence that it was not customary to keep such a large sum of money in the office; that only employes of appellee knew that such would be done on the night of November 27th; that the money was kept in the office in direct disregard of prior instructions from the employer; that the back door was bolted and could not be opened from the outside; that the cash box was locked and could not be

1. Appellant states as a fact, "Keys to the premises were possessed by employes who had been discharged by plaintiff." (App. Br. 7) If by this appellant means that those persons possessed such keys *while they were employed by appellee* there is support for such a statement. There is, however, no evidence that any such persons possessed a key to the premises at the time of the theft. Such might be a permissible inference from the evidence adduced, but it is not a necessary one. On this appeal it must be presumed that the trial court drew no such inference. Accordingly, no separate treatment is accorded these former employes.

opened without a key; that there was no forcible entry of the premises, the desk or the cash box; that only employes had keys to the premises, the desk and the box; that the premises were lighted and the rear room, where the money was left, was visible from the street outside; that there was no sign of any random search of the premises having been made, or of any property, other than the currency, having been taken or disturbed; that at least three of the employes (Scott, Mrs. Keene and Pitts, the janitor) were alone in the office on separate occasions on the night of November 27 and the morning of November 28, the time that the money was stolen.

Considering only the foregoing evidence it would appear that the trial court could reasonably have reached no other conclusion than that one or more of appellee's employes participated in the theft.

Appellant points to certain evidence which it contends makes the other alternative (that only strangers participated in the theft) not only a permissible inference but the only reasonable one to be drawn. This, we submit, is erroneous as will readily be seen when such evidence is examined.

The evidence thus relied upon by appellant is (1) that on frequent occasions before the theft the doors of the office were found open when the employes came to work, (2) the alleged fact that the front door could be opened without a key, (3) the alleged fact that only Scott had a key to the desk and only Farquhar had a key to the cash box, (4) that certain of the employes denied taking the money or participating in the taking of it, (5) that thefts at the Oakland airport were not uncommon (App. Br. 5-8) (6) that persons are presumed innocent of crime.

(1)-(4) It is of course elementary that testimony which is contradicted directly by other evidence, or is contrary to

inferences that may reasonably be drawn from other evidence, may be rejected by the trier of fact. It is also the law that on appeal it will be presumed that any such conflict in the evidence was resolved in favor of the prevailing party. *Waters v. United States* (9th Cir. 1951), 191 F.2d 212, 214; *Peterson v. Denevan* (8th Cir. 1949), 177 F.2d 411, 412.

The testimony that on frequent occasions before the theft the doors of the office were found open when employes came to work is, of course, relevant only because it could be inferred therefrom that the doors may have been open on the night or morning when the theft occurred. There is, however, direct testimony that both doors were locked when Scott left on the night of November 27 and were locked when Mrs. Keene arrived the next morning. (R. 58-59, 88, 167)

The evidence that the front door could be opened without a key was contradicted by the testimony of both police officers. (R. 118, 132-133) Mrs. Keene and Farquhar each testified that on occasions prior to the theft when they had forgotten their keys they had found it necessary to break a window to get into the office. (R. 72, 95)

According to the testimony, only Scott had a key to the desk in which the cash box was placed. This key, however, had been used by other employes with opportunity for duplicating it. In any event the testimony was clear that the desk could be opened without a key as demonstrated by Mrs. Keene. Only Farquhar admitted having a key to the cash box but there were other keys to this box in an unlocked desk in the outer office readily available to all the employes and another employe, Ferris, had a key that would unlock the cash box. (R. 188) Furthermore, the testimony with respect to the events of Saturday morning, when the loss was discovered, belie the truth of this testimony. Farquhar ostensibly was called by Mrs. Keene on Saturday solely for

the purpose of escorting her to the bank. (R. 62) On direct examination she testified she did not know why she called him instead of having Scott go with her. (R. 90) On cross examination she defended calling this employe who had the day off and who lived in Berkeley a substantial distance from the office on the ground that "it was unlikely for me to ask my boss to take me to the bank I guess." (R. 98) If we accept the denial of all of these employes of knowledge of the existence or whereabouts of the spare keys to the cash box, then the cash box could not have been opened without Farquhar and he would have had to be called to the office on Saturday. It is significant that this simple and obvious explanation escaped the witnesses at the trial.

Appellant seems to place considerable reliance upon the specific denials of dishonesty by those employes of appellee who testified at the trial. (App. Br. 8) This testimony is, we submit, directly contrary to inferences that may reasonably be drawn from other evidence in the case. In any event the four employes so testifying were not the only employes who had, or could have had, knowledge, means, and opportunity to commit the theft. Among these others is the janitor, Pitts, who was not called and did not testify at the trial.

As indicated above, in each instance the testimony relied upon by appellant was either directly contradicted by other evidence or was contrary to inferences which could be drawn therefrom. The trial court was therefore free to resolve such conflict against appellant and on appeal we must presume that it did so.

Even if, contrary to what we believe to be the fact, some of the foregoing testimony is deemed to be uncontradicted, the trier of fact was still entitled to reject it. All of this testimony was given by employes who would be natural suspects and who were in fact all interrogated by the police

and given lie detector tests. (R. 123) Since the testimony in question tended to show that it was possible that some stranger was responsible for the theft, it is obvious that each of the witnesses had an interest in so testifying. This is particularly true of the outright denials of complicity in the theft. For this reason alone the trial court was free to disbelieve all of such testimony. *Broadway Music v. Havana Madrid Restaurant Corp.* (2d Cir. 1949), 175 F.2d 77, 80.

While we do not believe it is here necessary to rely upon such a principle of law in view of the conflict in the evidence and the "interest" of these witnesses, it appears to be the settled rule that the trier of fact, as the sole judge of the credibility of witnesses, is free to reject even uncontradicted testimony. *Ly Shew v. Dulles* (9th Cir. 1954), 219 F.2d 413, 416; *Quon v. Niagara Fire Ins. Co. of New York* (9th Cir. 1951) 190 F.2d 257, 259. In *National Labor Relations Board v. Howell Chevrolet Co.* 204 F.2d 79, in answering a contention that uncontradicted testimony must be believed, this court stated:

"This is an ancient fallacy which somehow persists despite the courts' numerous rulings to the contrary. It overlooks the significance of the carriage, behavior, bearing, manner and appearance of a witness—his demeanor—when his testimony is given orally in the presence of the trier of facts." (204 F.2d at p. 86)

(5) Appellant in its brief states, "Thefts at the Oakland Airport were not uncommon." (App. Br. 7) This statement is made in reliance upon the testimony of police inspector Gustavson who, on examination by appellant, testified that there had been "three or four" petty thefts at Oakland Airport, instances where "lockers had been broken into" and drawers of desks "pried open" with "some instrument". (R. 159) This evidence of forcible entry of lockers and desks by

petty thieves is so remote and is entitled to so little weight that it is surprising that appellant relies on it. If anything the element of *forcible entry* present in each of these instances points up the difference between an "outside" and an "inside" job and thus strengthens appellee's position.

(6) In its brief appellant also relies upon what it terms "the strongest of all rebuttable presumptions, namely, that a person is innocent of crime or wrong." (App. Br. 8) We do not, however, see how such presumption is entitled to any weight in the factual situation with which we are here concerned. First of all, it is clear and undeniable that the loss was caused by the fraud or dishonesty of some person or persons. Second, it is not necessary that the assured be able to designate the specific employe or employes causing the loss. (R. 4) We therefore have two categories, employes and non-employes, one of which must have been responsible for the theft in question. No reason is given, nor is any apparent, why the presumption of innocence is any more applicable to the employes as a group than to the non-employes as a group. Accordingly, we believe that the presumption is of no consequence here.

We believe that we have demonstrated that the evidence relied upon by appellant on this appeal must either be entirely disregarded or is entitled to little or no weight. In any event the most that can be said for appellant's evidence is that it might support an inference contrary to that reached by the trial court, but does not require such inference. Where different inferences are permissible, as we have shown, the inference drawn by the trial court must be sustained. In fact, it would appear that the inference for which appellant contends—to wit, that the loss was caused by the fraud or dishonesty of one or more non-employes without

the aid of any of the employes—is an inference that the trial court could not properly have drawn from the evidence.

To support such inference we would have to assume that the non-employee knew that a large sum of money was to be in the office that night, that he knew where it was to be kept, that he had the means—without the use of force—to get into the office, into the desk, and into the cash box, that he was familiar enough with the premises to do all of these things without causing any evident disarrangement, and that he accomplished all of this without being seen by anyone in the area. Merely to state this is to expose the weakness of appellant's theory.

In the only case we have found that is close to the present case on the facts and the contract, a recovery by the assured was affirmed on appeal. *Durham Pepsi-Cola Bottling Co. v. Maryland Cas. Co.* (1947), 228 N.C. 411, 45 S.E. 2d 375.

CONCLUSION

It is respectfully submitted that substantial evidence supports the crucial finding of the trial court that the evidence adduced reasonably establishes that the loss was due to the dishonesty of one or more of plaintiff's employes rather than to the act of a stranger and accordingly the judgment should be sustained on this appeal.

Dated, San Francisco

February 14, 1956.

Respectfully submitted,

RICHARD ERNST

R. L. MILLER

RICHARD G. LOGAN

Attorneys for Appellee



No. 14,847

IN THE

United States Court of Appeals
For the Ninth Circuit

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE
CORP., LIMITED, a Corporation,

Appellant,

VS.

INDEPENDENT MILITARY TRANSPORT
ASSOCIATION, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

THOMAS E. DAVIS,

405 Montgomery Street, San Francisco 4, California,

Attorney for Appellant.

FILED

MAY - 7 1936

PAUL P. O'BRIEN, CLERK



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THE UNIVERSITY OF CHICAGO

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No. 14,847

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE
CORP., LIMITED, a Corporation,

Appellant,

VS.

INDEPENDENT MILITARY TRANSPORT
ASSOCIATION, a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

The general principles applicable to the case are not in dispute. Both sides agree that the burden was upon appellee to prove by a preponderance of the evidence that an employee of the insured was guilty of theft. Both sides agree that "preponderance of evidence" means "probability of Truth". (*Archer v. Fox*, D. C. Ky., 134 F. Supp. 27, 29.) Both sides agree that "circumstantial evidence may outweigh in convincing force, both the strongest of disputable presumptions (sometimes said to be the presumption of innocence) and direct evidence as well". (*Scott v. Burke*, 39 Cal. 2d 388, 398, 247 P. 2d 313.) And both sides accept

the law thus declared in *Sanders v. MacFarlane's Candies*, 119 Cal. App. 2d 497, 500, 259 P. 2d 1010:

“ ‘Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn in any given case, is a question of fact for the jury.’ (*Blank v. Coffin*, 20 Cal. 2d 457, 461.) An inference cannot be based on mere possibilities; it has been held that it must be based on probabilities. (32 C.J.S. 1132, 1133; *Gardner v. Seymour*, 27 Wn. 2d 802, 180 P. 2d 564, 569; *Kenwood Lbr. Co. v. Illinois Cent. R. Co.*, 65 F. 2d 663, 665.) This accords with the general principle, enunciated more than once by this court, that in civil cases the rule of decision is a rule of probability only. (*Spolter v. Four-Wheel Brake Serv. Co.*, 99 Cal. App. 2d 690, 693, 222 P. 2d 307; *Wirz v. Wirz*, 96 Cal. App. 2d 171, 175, 214 P. 2d 839, 15 A.L.R. 2d 1129.) ‘It is not necessary, in order to establish a theory by circumstantial evidence, that the facts be such and so related to each other that such theory is the *only* conclusion that can fairly or reasonably be drawn therefrom . . .’ (*Katenkamp v. Union Realty Co.*, 36 Cal. App. 2d 602, 617, 98 P. 2d 239.) The plaintiff relying on circumstantial evidence does not have to exclude the possibility of every other reasonable inference possibly derivable from the facts proved. (*Vacarezza v. Sanguinetti*, 71 Cal. App. 2d 687, 692, 163 P. 2d 470; *Spolter v. Four-Wheel Brake Serv. Co.*, *supra*, at p. 694.)”

The disagreement of the parties is over the legal effect of the evidence. The position of appellant is that the evidence is too shadowy and too speculative

to brand as a thief any employee of the insured, and that the finding of the lower court to the contrary is therefore clearly erroneous. The appellee, of course, is persuaded that the evidence is substantial enough and probable enough to brand as a thief one of the employees of the insured, and that the finding of the lower court to that effect is not erroneous at all.

It is said in appellee's brief (p. 18) that the case of closest approach is *Durham Pepsi-Cola Bottling Co. v. Maryland Cas. Co.*, 228 N.C. 411, 45 S.E. 2d 375, where theft of money from a safe was involved. Factually, the case is remote. There it is said:

"Of the persons other than employees who now knew or had previously known the combination of the safe all were examined and the evidence tended to show that they were not in Raleigh at the time, did not participate in the affair, and knew nothing of it.

The plaintiff introduced expert evidence tending to show that the safe was of such construction and the combination of such character that it could have been opened only by one knowing the combination, or by the use of external force, as by 'blowing' or 'burning' into it; that the chance of opening it by working the combination was negligible for anyone who did not know it."

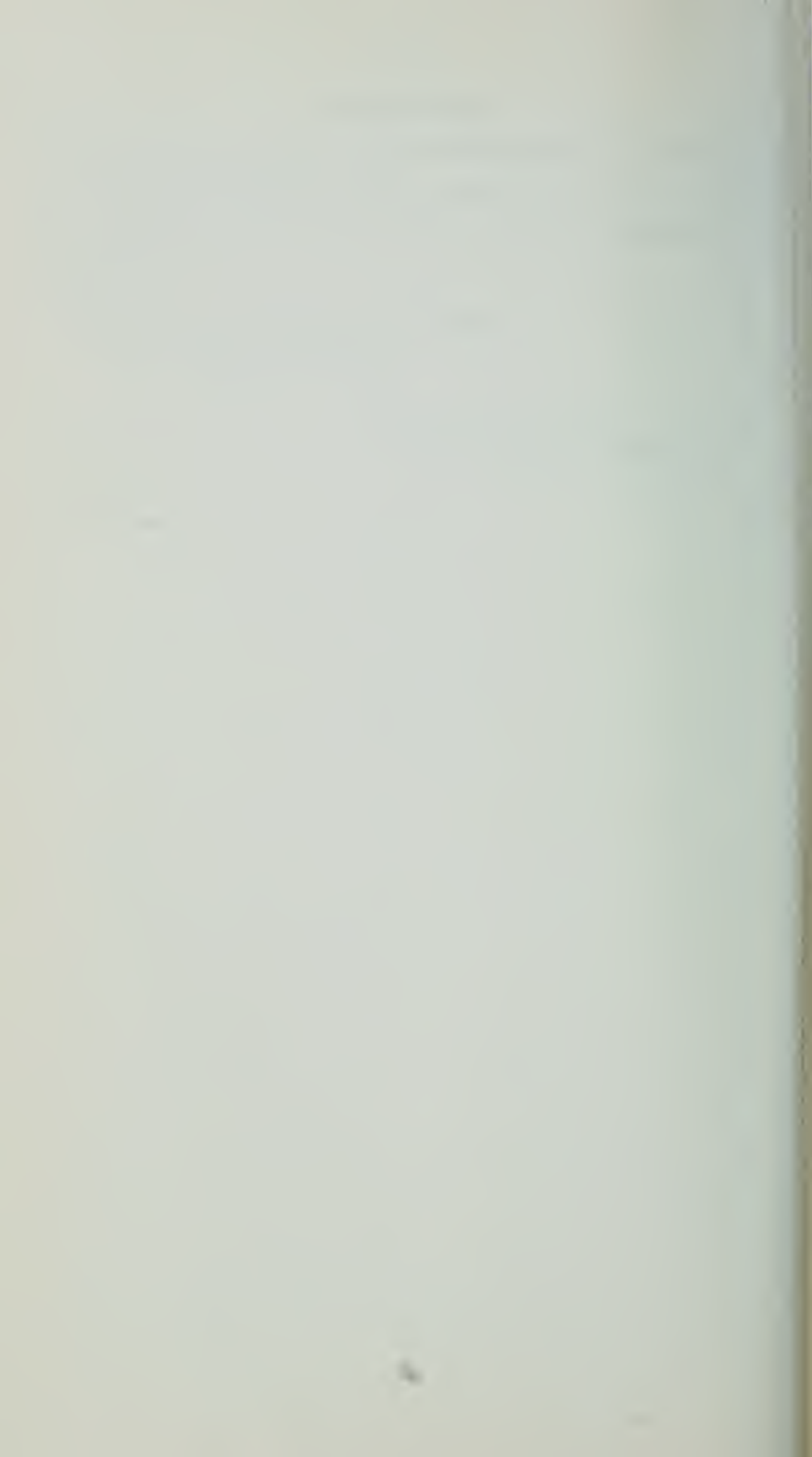
Since appellant must abide the reaction of this court to the record, elaboration of arguments is not indicated.

CONCLUSION.

Therefore, appellant again respectfully submits that the judgment appealed from should be reversed with directions to the trial court to enter judgment for appellant.

Dated, San Francisco, California,
March 5, 1956.

THOMAS E. DAVIS,
Attorney for Appellant.



No. 14848

United States
Court of Appeals
for the Ninth Circuit

CHESTER GUTH, Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the District
of Montana, Great Falls Division

FILED

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PAUL P. O'BRIEN, CLERK



No. 14848

United States
Court of Appeals
for the Ninth Circuit

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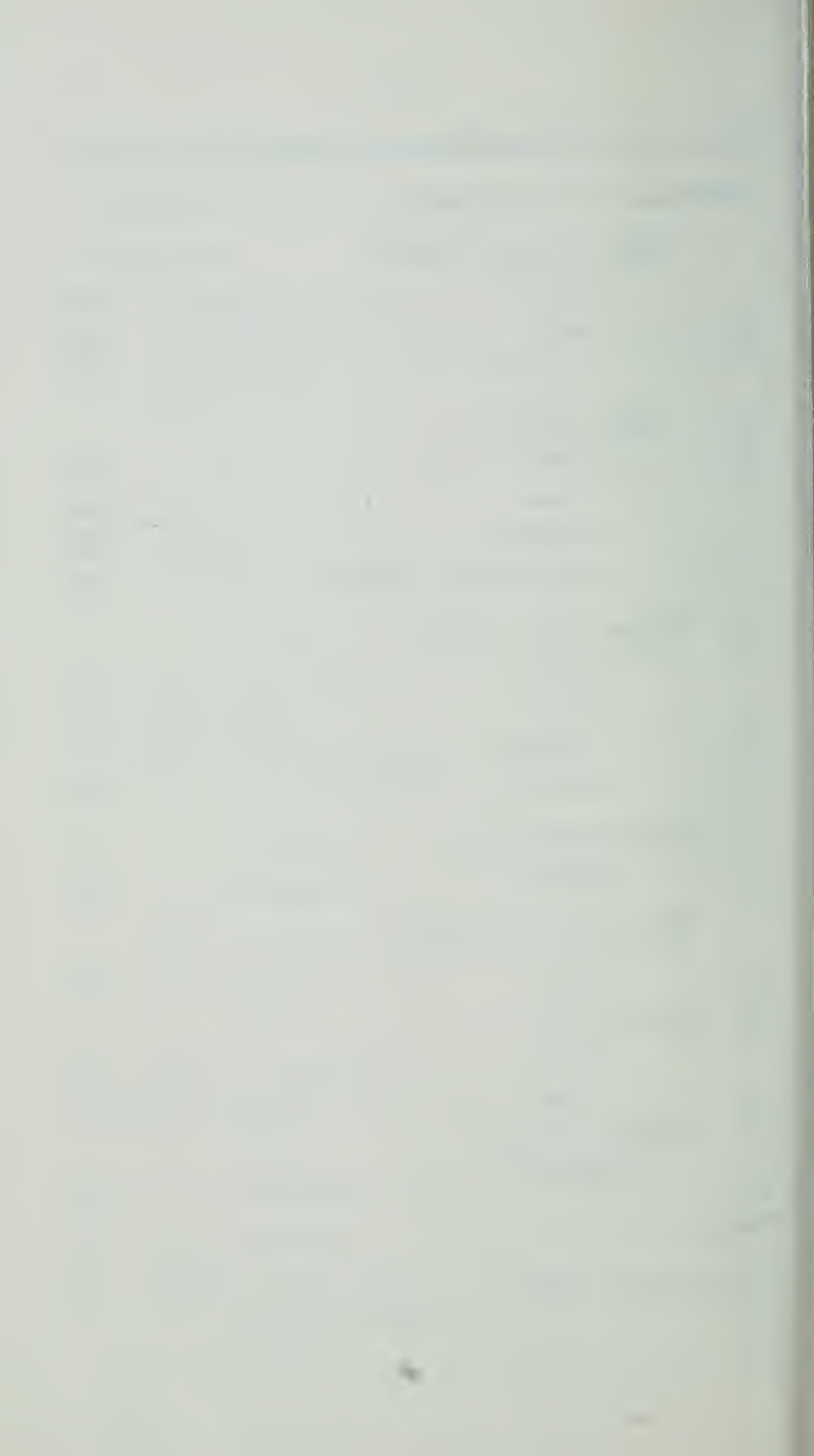
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Barber Lydiard Building,
Great Falls, Montana,

Attorney for Defendant-Appellant.



In the United States District Court for the District
of Montana, Great Falls Division

Criminal No. 8503

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHESTER GUITH,

Defendant.

INDICTMENT

The Grand Jury Charges:

Count I.

(18 U.S.C. 1152) (R.C.M. 94-4101)

That on or about the 9th day of January, 1954, at the Guith ranch, approximately ten miles West of the City of Cut Bank, and at a place within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, and within the State and District of Montana, the defendant, Chester Guith, did willfully, unlawfully, and feloniously have sexual intercourse with one Eleanora Gobert, a female Indian person of the age of fifteen (15) years and not at said time the wife of said defendant.

A True Bill:

/s/ HARRY A. MANSFIELD,
Grand Jury Foreman

/s/ KREST CYR,
United States Attorney

[Endorsed]: Filed November 9, 1954.

[Title of District Court and Cause.]

WARRANT FOR ARREST OF DEFENDANT

To any United States Marshal or any other authorized officer:

You are hereby commanded to arrest Chester Guith and bring him forthwith before the District Court of the United States for the District of Montana in the city of Great Falls to answer to an Indictment charging him with having unlawful sexual intercourse with a female Indian person not at said time his wife, on the Blackfeet Indian Reservation on January 9, 1954, in violation of Title 18, Section 1152, USC, and R.C.M. 94-4101.

November 12, 1954.

[Seal]

H. H. WALKER,

Clerk

/s/ By ELIZABETH C. McKEE,

Deputy Clerk

Bail Fixed at \$2,500.00, returnable first day next term at Great Falls, Montana.

Marshal's Return attached.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Defendant was duly called for arraignment, plea and trial this day, said defendant being personally present in court with his attorney, Mr. Jerry J. O'Connell, and Messrs. Michael J. O'Connell and Frank M. Kerr, Assistants to the United States

Attorney, being present and appearing for the United States.

Thereupon the defendant was duly arraigned and answered that his true name is Chester Guith, whereupon the indictment was read to the defendant. Thereupon the defendant entered a plea of not guilty, whereupon counsel for the respective parties announced that they are ready for trial.

Thereupon the following persons were duly impanelled, accepted and sworn as a jury to try the cause, viz:

John Waggoner, Julius E. Nygard, Fred T. Saylor, Leo E. Ogle, Adolph Einan, R. L. Adolphson, Hazel Ingels, John J. Ferda, Rose E. Samson, John L. Poore, William J. Toy and Ralph W. Schell.

Thereupon R. E. Miles, Eleanora Gobbert, H. C. Davis and Dr. Edward L. King were sworn and examined as witnesses for the United States, and a certain X-Ray film, marked Plaintiff's Exhibit No. 1, was offered and received in evidence, over the objection of counsel for the defendant.

Thereupon Gene P. Fopp and Edward M. Gobert No. 2 were sworn and examined as witnesses for the United States, whereupon the United States rested.

Thereupon the jury was duly admonished by the Court and excused until 10:00 a.m. tomorrow, and further trial of the cause was ordered continued until that time.

Entered in open Court at Great Falls, Montana, June 9, 1955.

H. H. WALKER,
Clerk

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the Indictment on file herein.

/s/ R. L. ADOLPHSON,
Foreman

We recommend leniency.

[Endorsed]: Filed June 11, 1955.

In the District Court of the United States, District
of Montana, Great Falls Division

Criminal No. 8503

UNITED STATES OF AMERICA,
vs.
CHESTER GUITH

JUDGMENT AND COMMITMENT

On this 11th day of June, 1955, came the United States Attorney, and the defendant appearing in proper person and by his counsel, Mr. Jerry J. O'Connell.

And the defendant having been convicted on the verdict of guilty of the offense charged in the Indictment in the above entitled cause, to-wit: that on or about the 9th day of January, 1954, at the Guith ranch, approximately ten miles West of the City of Cut Bank, and at a place within the exterior boundaries of the Blackfeet Indian Reservation, being

Indian Country, and within the State and District of Montana, the defendant, Chester Guith, did wilfully, unlawfully, and feloniously have sexual intercourse with one Eleanora Gobert, a female Indian person of the age of fifteen (15) years and not at said time the wife of said defendant.

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is By the Court Ordered and Adjudged that the said defendant having been found guilty of said offense, be committed to the custody of the Attorney General of the United States, or his authorized representative, for imprisonment for the term of Six Years.

It is further ordered that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer and that the same shall serve as the Commitment herein.

/s/ CHARLES N. PRAY,
Judge

[Endorsed]: Filed and entered June 11, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of appellant: Chester Guith, Box No. 1, Cut Bank, Montana.

Name and Address of appellant's attorney: Jerry J. O'Connell, 305 Barber-Lydiard Building, Great Falls, Montana.

Offense: The appellant was convicted of the crime of statutory rape in that he had sexual intercourse with a female Indian person of the age of fifteen (15) years, and not at said time the wife of said defendant.

A judgment on the verdict of Guilty was made and entered on the 11th day of June, 1955, in the above entitled Court, sentencing the defendant to serve six (6) years in an institution of the penitentiary type.

The defendant is now confined in the Cascade County, Montana, jail, situated at Great Falls, Montana.

I, the above named appellant, by and through my attorney of record, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

Dated this 13th day of June, 1955.

/s/ JERRY J. O'CONNELL,
Attorney for the Appellant

[Endorsed]: Filed June 13, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The appellant in the above entitled action sets forth the following points on which he intends to rely on his appeal to the United States Court of Appeals for the Ninth Circuit:

The trial Court erred as follows:

1. In denying appellant's objection to the trial of the aforesaid action under Sections 18 U.S.C. 1152, R.C.M. 94-4101, which said trial should have been under the provisions of 18 U.S.C. 2032;

2. In admitting appellee's exhibit No. 1, in that said exhibit was irrelevant, immaterial and incompetent and no foundation had been laid to connect said exhibit with the appellant;

3. In denying appellant's motion to strike all of the testimony of the witness, Dr. Edward L. King, in that said testimony was irrelevant and immaterial and no foundation was laid to connect it with the appellant herein;

4. In denying appellant's motion for a judgment of acquittal on the grounds that the Government had failed to prove that the Guith ranch, at which the crime was allegedly committed, was in Indian country as alleged in the Indictment, so that the Court had no jurisdiction of the offense alleged herein, and on the further ground that the Government had failed to prove the crime charged in the Indictment in that there was no proof of penetration of the female sexual organ of the alleged victim;

5. In refusing to admit into evidence appellant's proposed exhibit No. 2;

6. In refusing to admit into evidence appellant's proposed exhibit No. 3;

7. In refusing to admit into evidence appellant's proposed exhibit No. 4;

8. In denying appellant's objection to the admission of the testimony of the witness Fopp relative to the alleged confession of the appellant, there being no proper foundation laid for the admission thereof;

9. In denying appellant's motion for a judgment of acquittal at the close of the trial on the grounds of lack of jurisdiction of the Court because of failure to prove that the alleged crime was committed in Indian country, and on the further ground that there was no proof of penetration of the female sexual organ, and that the evidence was insufficient to support a conviction under the Indictment;

10. In instructing the jury that the Guith ranch, where the alleged offense was committed, was within Indian country, the evidence showing that said ranch was held by deed by the appellant herein without reservation of any kind or nature by the United States;

11. In instructing the jury that Title 18 U.S.C. 2032 was applicable to the case after the entire trial had proceeded under Title 18 U.S.C. section 1152, R.C.M. 94-4101;

12. In instructing the jury that section 7, subdivision 3, Title 18 U.S.C. applied to this case, the crime not having been committed on lands reserved

or acquired by the United States or under the exclusive or concurrent jurisdiction thereof or in any other manner under said subsection.

13. As further error, the appellant cites that the verdict of the jury and the judgment of conviction and sentence is not supported by the law and the evidence adduced in the case.

/s/ JERRY J. O'CONNELL,
Attorney for Appellant

[Endorsed]: Filed June 28, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Honorable H. H. Walker, Clerk of the
United States District Court for the District
of Montana, Great Falls Division:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit with reference to the Notice of Appeal filed by the appellant in the above entitled cause, transcript of the record in the above cause prepared and transmitted as required by law and by the rules of said Court, and to include in said transcript of record the following documents or certified copies thereof, to-wit:

1. The Indictment returned by the Grand Jury and heretofore filed, charging the appellant herein with having violated 18 U.S.C. 1152, R.C.M. 94-4101, in that he had sexual intercourse with a

female Indian person of the age of fifteen years and not at said time the wife of said appellant, said offense allegedly having taken place in Indian country;

2. The plea of not guilty to the Indictment made and entered on June 9, 1955;

3. The judgment and sentence of the Court on the verdict of guilty made and entered on June 11, 1955;

4. Defendant-appellant's exhibits numbers 1, 2, 3 and 4;

5. A copy of the official reporter's transcript of the evidence and proceedings in the trial in the District Court on June 9, 10 and 11, 1955, including the instructions of said Court to the jury and appellant's exceptions thereto;

6. Notice of Appeal to the United States Court of Appeals for the Ninth Circuit filed with the Clerk of the above entitled Court on June 13, 1955;

7. This designation of record;

8. Appellant's statements of points to be relied upon on said appeal.

Dated at Great Falls, Montana, this 28th day of June, 1955.

/s/ JERRY J. O'CONNELL,
Attorney for Appellant

[Endorsed]: Filed June 28, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers, to-wit: Indictment, Verdict, Judgment and Commitment, Notice of Appeal, Designation of Record, Appellant's Statement of Points to be relied upon on appeal, are the original papers filed in Case Number 8503, United States of America, Plaintiff, vs. Chester Guith, Defendant, and designated by the appellant as the record on appeal in said cause; and that the minute record of the plea of not guilty by said defendant is a true copy of the minutes of the Court in said cause.

I further certify that I transmit herewith, as a part of the record on appeal, the Reporter's Transcript of Record filed on July 12, 1955, and the exhibits called for in the designation, to-wit: Plaintiff's Exhibit No. 1, Defendant's Exhibit No. 2, which were admitted in evidence, and Defendant's Exhibit No. 3, Defendant's Exhibit No. 4, which were not admitted in evidence.

Witness my hand and the seal of said Court at

Great Falls, Montana, this 15th day of July, A. D. 1955.

[Seal]

H. H. WALKER,
Clerk as aforesaid

/s/ By C. G. KEGEL,
Deputy Clerk

In the District Court of the United States, District
of Montana, Great Falls Division

Criminal Cause No. 8503

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHESTER GUTH,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Charles N. Pray, United States District Judge, with Jury, Great Falls, Montana, June 9, 10 and 11, 1955.

Appearances: Mr. Michael O'Connell, Assistant U. S. Attorney, Mr. Frank Kerr, Assistant U. S. Attorney, Butte, Montana, for Plaintiff. Mr. Jerry J. O'Connell, Attorney at law, 305 Barber-Lydiard Bldg., Great Falls, Montana, for Defendant. [1*]

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

The above-entitled matter came on regularly for hearing in the United States District Court in and for the District of Montana, Great Falls Division, on June 9, 10 and 11, 1955, before the Honorable Charles N. Pray, Judge presiding, with a jury.

Whereupon the following proceedings were had and done-to-wit:

The Court: We have a case set for this morning at 11:00 o'clock. I believe the order of procedure now would be arraignment and plea. You may arraign the defendant.

The Clerk: United States vs Chester Guith for arraignment, plea and trial.

The Clerk: Chester Guith, is that your true name?

Defendant Guith: Yes, sir.

Whereupon the Clerk read the indictment to the defendant.

The Court: Are you ready to enter your plea now?

Mr. J. J. O'Connell: Yes, your Honor, we are ready.

The Court: Very well, what is your plea?

Mr. J. J. O'Connell: Not guilty.

The Court: Are there any preliminary motions?

Mr. J. J. O'Connell: No, we don't have any, your Honor.

The Court: Very well. And the Government they are [4] ready for trial?

Mr. M. O'Connell: Yes, your Honor.

The Court: And the defendant is ready for trial?

Mr. J. J. O'Connell: Yes, your Honor.

The Court: Very well, call a jury.

The jury was then duly empanelled and sworn.

The Court: You may proceed with your statement to the jury.

Mr. M. O'Connell made an opening statement of the case.

The Court: You desire to save your statement.

Mr. J. J. O'Connell: Your Honor, I would like to reserve the statement for the defense until the time of the opening of our case.

The Court: Very well.

The Court: Call your first witness.

Mr. M. O'Connell: Mr. R. E. Miles.

R. E. MILES

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. M. O'Connell): Would you please tell the court and jury your name and occupation? [5]

A. R. E. Miles, Administrative Officer, Blackfeet Indian Agency, Browning, Montana.

Q. Mr. Miles, as part of your occupation do you keep the rolls for the Indian Reservation?

A. Administratively I do, yes, sir.

Q. And do those rolls reflect all Indians enrolled in the tribe?

A. To December 31, 1939 in this one and then we use a card system from there on.

Q. Are those records kept in the regular course

(Testimony of R. E. Miles.)

of business in the conducting of affairs of the Indian Bureau? A. They are.

Q. Those are official records?

A. They are.

Q. Are they official records required to be kept by the United States Government? A. Yes.

Q. Are you the custodian of those records?

A. I am as administrative officer.

Q. You are the custodian and I ask you to refer to your records, your rolls and see if you find there-in the name Eleanora Gobert? A. I do.

Q. Is she listed as an Indian?

A. She is 11/16th Blackfeet. [6]

Q. 11/16th? A. Yes.

Q. And is there any information as to her birth date? A. August 14, 1938.

Q. Would you repeat that?

A. August 14, 1938.

Q. Do those records reflect who her parents might be? A. They do.

Q. Who are the parents?

A. Edward M. Gobert.

Q. Is he an Indian, enrolled Indian?

A. He is allotment number 656.

Q. And is he a full blood?

A. He is 5/8ths.

Q. 5/8ths? A. Yes.

A. And the mother?

A. Roselle Dustbull Gobert.

Q. And is she enrolled?

A. She is enrolled under 1765.

(Testimony of R. E. Miles.)

Q. And what is her blood ratio?

A. 3/4ths.

Q. Blackfeet? A. Yes, sir.

Q. Do those records reflect or should they reflect [7] the marital status of any of the enrolled Indians?

A. We do not keep marriage records. I have seen these records show the marital status as of the date we enrolled them, or on the census I should say.

Q. When was that census?

A. This census was December 31, 1939.

Q. Does that reflect whether Eleanora Gobert was married?

A. No, she is single on this record.

Q. I now ask you how long you have been on the Blackfeet Reservation?

A. Well actually I have been on the Blackfeet Reservation about 19 years.

Q. And in the course of your official capacity and also from residence are you familiar with the exterior boundaries of the Blackfeet Reservation?

A. Yes, I am.

Q. Would you tell us what the northern boundary is?

A. Do you want me to look at the——

Q. If you know of your own knowledge?

A. The Canadian Line.

Q. The eastern line?

A. The eastern boundary is Cut Bank and then about two miles north of Cut Bank, I am giving you

(Testimony of R. E. Miles.)

an estimate, and then it goes up to the Canadian Line.

Q. How about the southern boundary? [8]

A. The southern boundary is Birch Creek.

Q. And the western boundary?

A. Western boundary is Glacier National Park and Lewis and Clark National Forest.

Q. Now, Mr. Miles, in the time you spend on the reservation have you had any occasion to become acquainted with the location of the Chester Guith ranch?

A. Well, I will have to put it this way, I and the Irrigation Engineer was out that way I should judge about a year ago or something like that and we were discussing an experimental grass plot and he told me, he pointed out that lay near the Seville Irrigation.

Mr. J. J. O'Connell: To which we object on the grounds that it is hearsay.

The Court: Sustain the objection.

Mr. M. O'Connell: That is all we have at this time from the witness.

Cross Examination

Q. (By Mr. J. J. O'Connell): Now, Mr. Miles, I just had one question. When you were asked whether or not you had a record with reference to the marital status of Eleanora Gobert I think you stated that the census was taken on December 31, 1939? [9]

A. That is when it was made, yes, sir.

(Testimony of R. E. Miles.)

Q. And she according to your records was born August 14, 1938?

A. Just a minute now.

Q. Is that correct? A. That is correct.

Q. So that when you say she was single as of your record December 31, 1939, you base that on the fact she was just over a year old?

A. That is self-evident.

Q. Then you were not stating for the jury or for the benefit of the jury as far as your present record is concerned and particularly your record of the 9th day of January, 1954, that you have any record that shows the marital status of Eleanora Gobert?

A. That is correct.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: Call Eleanora Gobert.

The Court: We will take a recess for 15 minutes.
(2:10)

Court resumed, pursuant to recess, at 2:30 o'clock p.m., at which time the jury, defendant and all counsel were present.

Mr. M. O'Connell: Call Eleanora Gobert as a witness.

Mr. J. J. O'Connell: Your Honor, before we call her I [10] wonder if I could ask to have Mr. Miles recalled to ask him just one more question?

The Court: Certainly.

R. E. MILES

resumed the stand and testified as follows:

(Testimony of R. E. Miles.)

Cross Examination continued

Q. (By Mr. J. J. O'Connell): Mr. Miles, you gave Miss Gobert's birth date as August 14, 1938?

A. That is right.

Q. And I wondered how did you obtain that information?

A. From the census.

Q. Was that a census made in 1939?

A. Yes, sir. All the living Indians on that date were on this census, enrolled Indians.

Q. Some people went to the Gobert ranch, I mean somebody representing you?

A. No, sir, that was taken by birth and death certificates.

Q. By birth and death certificates?

A. Yes.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: Eleanora Gobert. [11]

ELEANORA GOBERT

the prosecutrix, was called as a witness for plaintiff and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. M. O'Connell): Would you state your name?

A. Eleanora Gobert.

Q. Where do you live?

A. Cut Bank.

Q. Do you live in Cut Bank?

A. About 10 miles west.

Q. 10 miles west?

A. Yes.

Q. Do you live on the Indian Reservation?

(Testimony of Eleanora Gobert.)

A. Yes.

Q. And what Reservation is that?

A. Blackfeet Indian.

Q. Blackfeet? A. Yes.

Q. And with whom do you live?

A. What?

Q. Who do you live with?

A. My folks.

Q. When you say your folks—— [12]

The Court: Have her speak louder.

Q. (By Mr. M. O'Connell): Who do you live with? A. My folks.

Q. Your father and mother? A. Yes.

Q. What are their names?

A. Roselle and Edward Gobert.

Q. Are you married? A. No.

Q. How old are you now? A. Sixteen.

Q. Have you ever been married? A. No.

Q. Have you ever lived as wife and husband with anyone? A. No.

Q. Now going to back to the year 1954 do you recall the events of the day January 9th, 1954?

A. Yes.

Q. And where were you living at that time? Where?

The Court: You will have to repeat her answers after her I suspect or some of the jury won't get it.

(Testimony of Eleanora Gobert.)

Q. (By Mr. M. O'Connell): Where were you living on January 9th, 1954?

A. On Seville. [13]

Q. Did you say Seville? A. Yes.

Q. And what is Seville?

A. Right around where we live.

Q. What?

A. Right around where we live.

Q. Were you living at home with your folks on that day? A. Yes.

Q. Do you remember what happened on January 9th, 1954? Where were you at noon on that day?

A. I was home right around just before noon.

Q. You say you were home just before noon?

A. Yes.

Q. And what were you doing?

A. Just around the house, listening to the radio.

Q. How can you remember what you were doing on January 9th, 1954 alone do you remember what day that was? A. Yes.

Q. What day was it? A. Saturday.

Q. And how can you remember that?

A. It was the first Saturday after school was out.

The Court: Can you all hear her testimony? Can you hear? Some of them can't on that back row. You might as well not examine this witness. You will have to repeat [14] her answers after her if she can't talk any louder than that.

Mr. M. O'Connell: Yes, your honor.

Q. (By Mr. M. O'Connell): Would you tell us

(Testimony of Eleanora Gobert.)

how you remember that it was a Saturday, the day January 9th, 1954?

A. It was the day school was out first weekend.

Q. The day school was out? A. Yes.

Q. Do you recall anything with reference to Christmas vacation of that year, were you still on Christmas vacation?

A. No, we just were back to school for about a week.

Q. You had been back to school about a week did you say? A. Yes.

Q. And what were you doing at home about noon that day?

A. I was listening to the radio.

Q. How long did you continue to listen to the radio? A. Until around twelve.

Q. Twelve o'clock noon? A. Yes.

Q. And what did you do then, did you say you were going to take a battery up to get it charged? A. Yes.

Q. What kind of a battery?

A. Car battery.

Q. And where were you going to take it? [15]

A. Chester Guith's place.

Q. When you say Chester Guith do you mean the man you see sitting here in the courtroom?

A. Yes.

Q. You were going to take the battery to his place? A. Yes.

Q. And where is his place from your ranch?

A. About a quarter mile west of our place.

(Testimony of Eleanora Gobert.)

Q. Is it located on the Reservation; is Chester Guith's ranch located on the Reservation?

A. Yes.

Q. And did you take this battery to the ranch of Chester Guith? A. Yes.

Q. How did you move the battery over there?

A. By sled.

Q. By a sled? A. Yes.

Q. And what did you do when you got to the Guith ranch?

A. Went up to the house and knocked at the door and there wasn't no one there.

Mr. J. J. O'Connell: You will have to speak up; it is just impossible to hear, your honor.

The Court: The jurors on the back row there some of them can't hear a word she says. [16]

Mr. M. O'Connell: Eleanora, if you will talk a little slower and a little louder.

Q. (By Mr. M. O'Connell): Now tell us what you did after you took the battery to the Guith ranch?

A. Went up and knocked on the door and there wasn't no one there so I went down to the tool shed.

Q. You knocked on the door and there was no one in? A. No.

Q. And was that at the ranch house?

A. Yes.

Q. And did you say you went to the tool shed then? A. Yes.

Q. And did you find anyone in the tool shed?

(Testimony of Eleanora Gobert.)

A. Yes, I found Chester Guith.

Mr. M. O'Connell: She said: Yes, I found Chester Guith.

Q. You found Chester Guith in the tool shed, is that right? A. Yes.

Q. Did you talk to Chester Guith at that time?

A. Yes.

Q. Did you talk to him at that time?

A. Yes.

Q. And what did, what was said between you and Chester [17] Guith?

A. Just went in and asked him if he would charge the battery. He said it was broke.

Q. What was broke?

A. The battery charger.

Q. He told you his battery charger was broke?

A. Yes.

Q. Was anything further said?

A. He just asked how school was and I said it was just the same as it always was.

Q. You told him school was just the same as it always was? A. Yes.

Q. What happened then?

A. I said "I got to go home." He said: "Why don't you stay a little while longer."

Mr. M. McConnell: Just a moment. Now, Eleanora, you are going to have to speak up. I can't hear you where I am standing.

Q. After you said school is about the same as it always is what further conversation took place?

(Testimony of Eleanora Gobert.)

A. I said I had to go home. Then he asked why didn't I stay a while longer.

The Court: Speak louder. There is no need making a farce of this; we have to hear what this witness is saying [18] and the jury has to hear, and if you can't hear yourself come up closer to her, and when she makes an answer, repeat it after her. We are going to find out what this witness is talking about.

Mr. M. O'Connell: I could hear her.

The Court: You said a moment ago you couldn't, and the jurors sitting on the back row they can't hear her testimony, 2 or 3 have indicated they don't hear it. Now you had better come up closer and let's find out what she has to say; that is what we are here for.

Q. (By Mr. M. O'Connell): Tell us what happened after you said school is about the same as it always is? Now speak up, please.

A. I said I have to be going home now and he asked why I didn't stay a while longer and I said Dad had to get the car started so he can go into town.

Mr. M. O'Connell: I can hear that, your honor, very plain from there.

The Court: I can't hear it and my hearing is pretty fair too.

Mr. M. O'Connell: Can you speak loud enough so I can hear you. I am further from you now than the jurors are so speak loud enough so I can hear what you are saying.

(Testimony of Eleanora Gobert.)

Q. And please tell us again what happened after you said school is about the same as it always was?

A. He asked why I didn't stay a little while longer and I said I had to get home so Dad could get the car started.

Mr. M. O'Connell: Can the jurors hear that?

Q. What happened after you said you have to get home to get the car started?

A. I started out the door and he pulled me back.

Q. Speak up. You did what?

A. I started out the door and he pulled me back.

Q. You mean Chester Guith pulled you back?

A. Yes.

Q. Pulled you back where?

A. Back in the place where he was in.

Q. And was that in the tool shed?

A. Yes.

Q. And what happened then?

A. He started trying to pull my clothes off me.

Q. Speak up, please, I can't hear that.

A. He started to pull my clothes off me so I started trying to get away and he wouldn't let me go.

Mr. M. O'Connell: And can the jurors hear that?

Q. And did this take place in the tool shed?

A. Yes.

Q. Was there any conversation between you and Chester Guith at that time? A. No. [20]

(Testimony of Eleanora Gobert.)

Q. And what happened after you say he started pulling your clothes off?

A. I started trying to get away.

Q. Did you get away? A. No.

Q. What happened then?

A. He threw me down right by the shelf.

Q. He threw you down where?

A. By the shelf.

Q. Well did he throw you against the wall or where? A. On the ground.

Q. Threw you on the ground? A. Yes.

Q. And what happened then?

A. He started to unbutton his overalls.

Q. He started unbuttoning his overalls?

A. Yes.

Q. Which buttons did he unbutton?

A. Down the front.

Q. And what happened then?

A. He had sexual intercourse with me.

Q. Where? A. In the tool shed.

Q. What clothing did you have on at that time?

A. I had panties and brassiere. [21]

Q. Panties and brassiere? A. Yes.

Q. You said he had sexual intercourse with you, how did he accomplish this? How did he do it?

A. He had his hand down on——

Q. Speak up and tell us how did he accomplish it.

A. He had my arms down by my side with his elbows and with his hands up there.

Q. He had his hands on your shoulders?

(Testimony of Eleanora Gobert.)

A. Yes.

Q. Did he have his hands on your shoulders all the time? A. Just a——

Q. Would you say that louder; I can't hear that?

A. He put them there after he got through unbuttoning his overalls.

Q. When you say sexual intercourse do you mean he placed his private part inside of your private parts? A. Yes.

Mr. J. J. O'Connell: Now, your honor, I don't want to be rough but I want to move to strike that on the ground it is completely leading and suggestive.

The Court: Well you may have to lead and suggest; it may be struck out for the present. Question her more particularly and let her state it in her own words.

Q. (By Mr. M. O'Connell): Now you said that the defendant Guith accomplished an act of sexual intercourse with you? A. Yes.

Q. Just exactly how did he do this?

A. How do you mean?

Q. What did he do that makes you say that he had sexual intercourse with you, what did he do?

A. How do you mean?

Q. Well do you know what sexual intercourse is; what is it?

A. Intercourse between a man and woman.

Q. And how is it done? Go ahead and speak up Eleanora and tell us, show us that you know how

(Testimony of Eleanora Gobert.)

it is done. Could you feel the defendant Chester Guith having sexual intercourse with you?

A. Yes.

Q. Where could you feel it?

A. On the inside.

Q. Up inside of you female organ?

A. Yes.

Q. And how did he accomplish this, how did he do this intercourse, what did he place inside you?

A. Male organ.

Q. He placed his male organ inside you?

A. Yes. [23]

Q. Was there any movement of his body during the intercourse, was there? A. Yes.

Q. And what sort of movement?

A. Up and down.

Q. Up and down? A. Yes.

Q. And you say that you could feel his organ inside you during this time? A. Yes.

Q. And when you say you could feel it inside you do you mean you could feel it inside your female organs? A. Yes.

Q. How long did this intercourse continue?

Mr. J. J. O'Connell: I didn't get her answer.

Q. How long did this intercourse continue?

A. About five minutes or more.

Q. About five minutes and then what happened?

A. After he got through he turned his back to me and told me to get up and go to the toilet so I wouldn't get pregnant.

Q. Do you remember what words he used?

(Testimony of Eleanora Gobert.)

A. Yes.

Q. Yes, what words did he use?

A. He said get up and pea so you won't get pregnant. [24]

Q. Will you say that again, please? What did he say?

A. He said get up and pea so you won't get pregnant.

Q. And was this still in the tool shed?

A. Yes.

Q. And what happened after that?

A. I got up and left there right away.

Q. You got up and left? A. Yes.

Q. Did you put any of your clothing back on?

A. Yes.

Q. Where did you go? A. Back home.

Q. And did you say that this happened on January 9th, 1954? A. Yes.

Q. Would you say that louder, please?

A. Yes.

Q. Would you tell us whether or not you had any children? A. One.

Q. You have one child? A. Yes.

Q. And when was this child born?

A. October 2nd.

Q. Would you say that louder, please?

A. October 2nd. [25]

Q. October 2nd in what year? A. 1954.

Q. 1954 and where did you have this child?

A. Browning hospital.

Q. You mean Browning, Montana?

(Testimony of Eleanora Gobert.)

A. Yes.

Q. And who delivered this baby?

A. Dr. King.

Q. Who? A. Dr. King.

Q. Dr. King? A. Yes.

Q. And is that a Government hospital at Brown-
ing? A. Yes.

Q. Now you have testified as to an act of inter-
course with the defendant Guith, would you tell us
whether or not you have had intercourse with any
other persons? A. No.

Q. You mean that you have not had intercourse?

A. No.

Q. And who did you name as the father of this
baby?

Mr. J. J. O'Connell: To which we object, your
honor, on the ground there has been no foundation
to show, no foundation laid to show whose baby
this was or how she got it or anything of the kind.

The Court: Well she said she had no intercourse
with [26] anybody else since then as I understood
it from what I heard of her testimony.

Mr. J. J. O'Connell: There is actually no evi-
dence in the record as to any insemination which
would cause birth and so on; I mean there isn't any
record of that kind.

The Court: Well I will let her state whose baby
she considered it; she can make her statement on
that.

Q. (By Mr. M. O'Connell): Whose baby did
you consider that baby to be?

(Testimony of Eleanora Gobert.)

A. Chester Guith.

Q. And would you tell us why you say that?

A. He is the only one I ever had intercourse with.

Q. And would you say that again?

A. He is the only one I have ever had intercourse with.

Q. The only one? A. Yes.

Q. That you have ever had intercourse with?

A. Yes.

Q. Eleanora, you told us that you left the tool shed after an act of intercourse and returned to your home on January 9th, 1954, now was there any conversation between you and defendant Guith just previous to your going home?

A. He told me not to tell my folks.

Q. What was that?

A. He told me not to tell my folks. [27]

Q. Did he say anything further?

A. He says——

Q. Could you say that louder?

A. He said they will really bawl me out for it if I told them.

Mr. M. O'Connell: Did the jurors hear this last testimony?

The Court: What did she say?

Mr. M. O'Connell: Your honor, she said that just as she was leaving the tool shed to go home defendant Guith said to her don't tell your folks or they will bawl you out for it.

Q. (By Mr. M. O'Connell): Do you recall

(Testimony of Eleanora Gobert.)

whether or not you had any other acts of intercourse with the defendant Guith on or about the 9th day of January, 1954?

Mr. J. J. O'Connell: To which we object, your honor, on the grounds that it is irrelevant and immaterial; the only offense involved here is the offense of which the defendant is charged.

The Court: Yes, that is all right, similar offenses about the same time are admissible; overrule the objection.

Mr. M. O'Connell: Read the question.

(Question read.)

A. Three or four other times after that. [28]

Q. Did you say you had intercourse three or four other times with him after that?

A. Yes.

Q. Do you remember when they were?

A. No.

Q. How long after the first time?

A. About three or four weeks after.

Q. Three or four weeks after and you said you had intercourse with him did you say three or four times? A. Yes.

The Court: Within three or four weeks afterwards three or four times.

Q. (By Mr. M. O'Connell): Eleanora, tell us whether or not the three or four times were three or four weeks after the first intercourse?

A. In three or four weeks after.

Mr. M. O'Connell: You may cross examine.

(Testimony of Eleanora Gobert.)

Cross Examination

Q. (By Mr. J. J. O'Connell): Now, Eleanora, how do you recall January 9th, 1954?

A. It was about the first week after we started school after Christmas vacation.

Q. Now you just said that within 3 or 4 weeks after [29] January 9th, 1954, that you had sexual intercourse with Mr. Guith and you don't remember those dates? A. No.

Q. You don't remember any of those dates?

A. No.

Q. Any of them at all? A. No.

Q. I didn't get your answer?

A. Not after the first.

Q. Now who first talked to you about this case?

A. You mean when?

Q. About bringing a charge, about bringing a charge against Mr. Guith?

A. It was the F.B.I.

Q. Who? A. F.B.I.

Q. The F.B.I.? A. Yes.

Q. And when was that?

A. It was around the first part of October.

Q. Around the first part of October, 1954?

A. Yes.

Q. And was that before or after this baby was born? A. It was after.

Q. It was after the baby was born and was that the [30] first time that you were asked to recall what date it was? A. Yes.

(Testimony of Eleanor Gobert.)

Q. And how did you pick out that date of January 9th, 1954.

A. It was the first week after school had started after Christmas vacation.

Q. Do you remember what the name of the F.B.I. agent was or remember any of their names?

A. I am pretty sure they called him Gene Fopp.

Q. Now did he ask you early in October of 1954 just what date it was?

A. He asked me if I could remember.

Q. And what did you tell him at that time?

A. I had to stop and think a while after that.

Q. You had to stop and think a while?

A. Yes.

Q. Did he suggest to you when it might have been?

A. No.

Q. He didn't suggest it at all?

A. No.

Q. And you are sure, you are sure it was in the month of January?

A. Yes, it was.

Q. Now do you remember just about what time it was, what time of the day? [31]

A. It was around one o'clock some place.

Q. Now you testified that you were home just before noontime listening to the radio, isn't that right?

A. Yes.

Q. And then was it your dad or your mother who asked you to take the battery over to Guith?

A. Dad asked me so he could get the car started.

Q. And about what time was that, around noontime?

(Testimony of Eleanora Gobert.)

A. You mean when he asked me to take the battery?

Q. When he asked you to take the battery over to Guith?

A. It was around quarter to twelve.

Q. About 15 minutes to twelve?

A. Yes.

Q. And did you go directly from your home over to Guith's home?

A. No, I waited until the program I was listening to was over.

Q. What until twelve o'clock? A. Yes.

Q. And then did you leave right after that?

A. Yes.

Q. Just about twelve o'clock or a little after twelve? A. Little after twelve.

Q. Now I think you testified your place was about a mile from Mr. Guith's ranch? [32]

A. About a quarter of a mile.

Q. About a quarter of a mile and about how long did it take you to get over there?

A. About 10 or 15 minutes.

Q. About 10 or 15 minutes so that it would be some time before twelve thirty that you got there, is that right?

A. About 5 or 10 minutes before, around 5 or 10 minutes before twelve thirty.

Q. Yes, something like that. Now you had been in the habit of going over to Guiths on many errands for your folks, isn't that true? A. Yes.

Q. You went over there not only with the bat-

(Testimony of Eleanora Gobert.)

tery but for eggs and for different things of that kind, hadn't you? A. Yes.

Q. And how long had that been going on?

A. Since that, around that fall before.

Q. Do you know or did you know Mrs. Guith?

A. Yes.

Q. Now do you know her quite well, have you seen her many times?

A. I talked to her quite a bit.

Q. You talked to her quite a bit. Now when you went over that day on the 9th of January as you say with the battery to be charged did you go first to the house? [33] A. Yes.

Q. Did you go to the front door? A. Yes.

Q. And do you remember what kind of a door they have? A. Yes, just about.

Q. It is an aluminum door, isn't that aluminum with a glass panel?

A. I guess it is now but then it was just a wooden screen.

Q. And did you knock on the door or use the bell or what did you do?

A. I knocked on the door.

Q. Did you knock on the screen door you are talking about or on the inside door?

A. Knocked on the inside door.

Q. And nobody answered? A. No.

Q. And the Guith children didn't come out and answer? A. No.

Q. And Mrs. Guith didn't come out and answer?

A. No, he told me that she was in town.

(Testimony of Eleanora Gobert.)

Q. Who told you she was in town?

A. Chester Guith.

Q. Do you remember what kind of a day January 9th, 1954 was? [34]

A. It wasn't real cold that day.

Q. It was what?

A. It wasn't real cold that day.

Q. It wasn't real cold, was there any snow on the ground? A. Yes.

Q. Do you know about how much?

A. About a foot deep.

Q. About a foot deep? A. Yes.

Q. And about how long did you knock on the door?

A. About 2 or 3 times and then I went out.

Q. Then you went out to the tool shed?

A. Yes.

Q. Is the tool shed fairly close to the house?

A. No, it is not real close to it.

Q. It is one of the smaller buildings, isn't that right, on the Guith farm; I mean there are several buildings on the farm, isn't that correct, but it is one of the smaller buildings closer to the house?

A. One of the smaller buildings but it is almost straight down from the barn.

Q. Are there any windows in the tool shed?

A. Yes.

Q. How many? A. About two. [35]

Q. Two windows, are they on the side facing the house? A. Yes.

(Testimony of Eleanora Gobert.)

Q. Now what kind of a floor is there in the tool shed? A. Just a dirt floor.

Q. Just a dirt floor. Are there any, you said when this act took place under a shelf or near a shelf?

A. Right by the shelf on the north wall.

Q. I didn't get all of your answer.

A. By the shelf on the north wall.

Q. By the shelf on the north wall, is that the side closest to the house?

A. It is the side opposite the house.

Q. On the side opposite the house?

A. Yes.

Q. You are sure of that now? A. Yes.

Q. And Mr. Guith told you that his charger was broken, is that right? A. Yes.

Q. Did he have it there in the tool shed?

A. He said it was at Johnny Flaget's house.

Q. It was where?

A. At Johnny Flaget's house being fixed.

Q. He told you that at that particular time, is that right? [36] A. Yes.

Q. And do you know Johnny Flaget?

A. No.

Q. When he told you it was at Johnny Flaget's what that mean to you?

A. Just mean it was some one from town.

Q. You knew it was some one from town, did anybody suggest to you that this battery charger, or I mean within recent weeks anybody suggest to

(Testimony of Eleanora Gobert.)

you that his battery charger was at Johnny Flaget's? A. No.

Q. Did you discuss your testimony in the past few weeks with Mr. Fopp?

A. No, he hasn't been there since last winter sometime.

Q. Did you discuss your testimony with the Assistant United States Attorneys?

A. Just asked me a few questions.

Q. Now as a matter of fact didn't you tell Mr. Fopp, didn't you tell Mr. Fopp that you went there and had the battery charged on that particular day?

A. I said I was going to have it charged.

Q. Well when he first talked with you didn't you tell him that you had the battery charged on that day?

A. No, I told him I was going to have it charged.

Q. That you were going to have it charged?

A. Yes.

Q. And you definitely testify now and make the statement now that Mr. Guith told you that the battery was at Johnny Flaget's, the battery charger?

A. Yes.

Q. Was the only thing he asked you about when you got to the tool shed was how school was?

A. He just told me where the charger was just before that and I said I had to be going home.

Q. I didn't mean what you said.

A. I said he just told me where the charger was just before that.

(Testimony of Eleanora Gobert.)

Q. What was Mr. Guith doing when you got there?

A. I don't know what he was doing; he was standing by the table there.

Q. Was that on the side close to the house or on the other side?

A. The side close to the house.

Q. On the side close to the house and you told him that school was just the same as it always was?

A. Yes.

Q. And then you said you were going to go home?

A. Yes.

Q. Is that all that went on?

A. Yes. [38]

Q. And then he said to you why don't you stay around a little while longer?

A. Yes.

Q. What did he say what he wanted you to stay around a little while longer for?

Mr. M. O'Connell: Objected to, your honor, as calling for a conclusion and opinion of the witness.

The Court: Well he can ask her if she knew why he said it.

Q. (By Mr. J. J. O'Connell): I mean did he tell you why he wanted you to stay around longer?

A. He said why don't you stay a little while longer and visit.

Q. And visit and then you started to go, was that it, or you started to leave or did you decide to stay?

A. I said I got to go home and help dad start the car.

Q. You got to go home and you started for the

(Testimony of Eleanora Gobert.)

door, is that right? A. Yes.

Q. Are there one or two doors on that tool shed? A. Two.

Q. There are two rather large doors, aren't they? A. Yes.

Q. What? [39] A. Yes.

Q. And as you went through the door he grabbed you, is that right? A. Yes.

Q. Did you have your back to him when he grabbed you?

A. I started to pull the door open and he pulled me back.

Q. You started to push the door open and he pulled you back, did he grab you by the shoulders or clothing or what? A. By my arms.

Q. Grabbed you by the arm? A. Yes.

Q. Now what kind of clothing did you have on that day, Eleanora?

A. I had a pair of jeans and jacket.

Q. You had a pair of jeans and a jacket?

A. Yes.

Q. Those are ordinary overall jeans?

A. Yes.

Q. Now do they button up the front or back or side? A. They zip up the side.

Q. They zip up the side, and what kind of a jacket did you have on?

A. It was a boy's jacket.

Q. It was a what? [40]

A. A boy's jacket.

Q. A boy's jacket—I mean was it a leather one or? A. Cloth.

(Testimony of Eleanora Gobert.)

Q. Cloth, and how did it button or did it have a zipper on it or what?

A. Zipped down the front.

Q. Zipped up and down the front?

A. Yes.

Q. And then the only under clothing you had were your panties and your brassiere?

A. Yes.

Q. That is all you had on? A. Yes.

Q. Now did he take, did Mr. Guith take your clothes off?

A. Just my jeans down to my ankles.

Q. He what?

A. Just my jeans down to my ankles.

Q. He took your jeans down to your ankles?

A. Yes.

Q. And that is as far as he took them?

A. Yes.

Q. Did he pull the zipper or did you pull the zipper? A. He did.

Q. He pulled the zipper and it was on the side?

A. Yes. [41]

Q. And did he pull your panties down?

A. No.

Q. No he did not? A. No.

Q. And what about your jacket, did he leave that on? A. Yes.

Q. He left that on, so that when you testified a few minutes ago that all you had on were your brassiere and panties that was not correct?

A. He just asked what under clothes I had on.

(Testimony of Eleanora Gobert.)

Q. Well at that time you meant to tell him what your under clothes were and not what you had on?

A. Yes.

Q. And were your panties taken down at any time? A. No.

Q. Now I think your testimony was as I have it here that while this was going on there was no conversation between you at all? A. No.

Q. Did you protest at all?

A. I did try to get away but I couldn't.

Q. Well did you tell him not to do it?

A. He asked me how I felt and I said I didn't know.

Q. I mean before you said that, that was after it had taken place; I am talking about when he was pulling down your [42] pants, how far and so on, did you fight with him or? A. Yes.

Q. What? A. Yes.

Q. What did you do?

A. Tried to get away.

Q. You tried to get away, did you tell him not to do it? A. I just kept trying to get away.

Q. Where were you when you were trying to get away, were you standing up? A. Yes.

Q. You were standing up, now there was some testimony that he threw you down by the shelf on the ground? A. Yes.

Q. Is that on this, did you state on this dirt ground or dirt floor?

A. He did have a canvas there by that wall.

Q. It was what?

(Testimony of Eleanora Gobert.)

A. A canvas laying by that wall.

Q. Did he put you down on the canvas?

A. Yes.

Q. So that when you told Mr. O'Connell that he put you down on the ground you really didn't mean that, he had a canvas there that he put you on? A. Yes. [43]

Q. Am I stating that correct? Is that correct, Eleanora? A. Yes.

Q. I think you know what an oath is, don't you? You know when you came up here you were sworn that you would tell the truth and the full truth about this whole thing and you realize what an oath is? A. Yes.

Q. Now you said that he had your arms down? A. Yes.

Q. And he had his hands on your shoulders? A. Yes.

Q. And he put them there until he had his pants unbuttoned, is that correct?

A. He had his one hand loose.

Q. He had one hand loose, I thought you said he had his hands on your shoulders?

A. I said he had his one hand on my shoulder until he got his pants down.

Q. Do you remember what kind of pants he had on that day?

A. They button down the front.

Q. I mean were they jeans or work pants or overalls or? A. It was jeans.

(Testimony of Eleanora Gobert.)

Q. They were I mean just short pants, they were just jeans? A. Yes. [44]

Q. And while he was doing this were you laying on the ground or on the canvas?

A. On the canvas.

Q. You were laying there while he was doing this? A. Yes.

Q. And all of the time you had your panty on, is that correct? A. Yes.

Q. Were those pants closed; I mean were they closed? A. What do you mean.

Q. Was there any opening in those pants?

A. No.

Q. No, was it a—did they cover your female organ, did they cover your body all around your female organ? A. Yes.

Q. Now you said that you felt his organ inside yours when Mr. O'Connell was questioning you; now, did you? A. Yes.

Q. You are sure of that? A. Yes.

Q. Even though you had these pants on?

A. He got it through the leg on the side.

Q. He got into the leg on the side; I thought you told me there hadn't been any opening in them?

A. The leg was kind of loose; the legs were kind of loose. [45]

Q. And I think you said you had never had an act of sexual intercourse before with anyone?

A. No.

Q. You never had? A. No.

(Testimony of Eleanora Gobert.)

Q. None of the boys around there, quite a few boys use to come to your place?

A. They were all cousins.

Q. They were just cousins; you have 3 or 4 sisters, don't you, older than you? A. Yes.

Q. And aren't there quite a few boys have been coming there right along and particularly in that period of time? A. No.

Q. What? A. No.

Q. There were not? A. No.

Q. No boys at all? A. No.

Q. And none of these boys had ever touched you? A. No.

Q. Had anyone tried to touch you?

A. No.

Q. Nobody had? A. No. [46]

Q. And none of these boys had ever touched you? A. No.

Q. Had anyone tried to touch you?

A. No.

Q. Nobody had? A. No.

Q. Well how did you know then that this was an act of sexual intercourse?

A. Well one of my cousins told me about it.

Q. A few of your cousins told you a lot about it? A. Just that one, Karen Brown.

Q. Karen Brown, is she your first cousin?

A. Yes.

Q. And did she tell you quite a bit about it?

A. Yes, every time I go down there she would

(Testimony of Eleanora Gobert.)

try and talk like that to me and I wouldn't pay no attention to her.

Q. I didn't get that; you wouldn't pay any attention to who?

A. To Karen Brown when she would try and talk that way to me.

Q. You wouldn't pay any attention to her?

A. No.

Q. Now you have some cousins that are boys, don't you? A. Yes, sir.

Q. How about it, have they ever talked to you about that? [47]

A. No, they never even used any kind of foul language around there.

Q. They did not? A. No.

Q. Now did you go home and tell your father about this situation? A. No.

Q. You never told him about it? A. No.

Q. Did you tell him at any time between January 9th, 1954 and October? A. No.

Q. Never told him a word about it?

A. No.

Q. Did you tell your mother? A. No.

Q. You didn't tell anybody? A. No.

Q. Now didn't they ask you about your condition? A. No.

Q. They ask you if you were pregnant?

A. No.

Q. Never asked you? A. No.

Q. I presume you lived in the house with your folks all [48] that period from January 9th, 1954,

(Testimony of Eleanora Gobert.)

down to October of 1954, and I presume you shared the house with them, the bathroom and so on, things of that kind; when was it the first time you told anyone that Chester Guith had done this to you?

A. When the F.B.I.

Q. When the F.B.I. came around; do you remember whether or not you took some shots in the hospital to make you talk? A. No.

Q. You don't remember any shots?

A. No.

Q. Was it in the hospital where you first told the F.B.I. about Mr. Guith?

A. No, he came to the house after I got home.

Q. He came to the house after you got home; now, as a matter of fact, didn't you tell your father that it was a lie that Chester Guith had done anything to you? A. No.

Q. You didn't tell him that? A. No.

Q. Did your father tell you that it was a lie that Chester Guith had done anything to you?

A. No.

Q. Now this was the first time you had ever had sexual intercourse with anybody as I understand your testimony? A. Yes. [49]

Q. I mean did it hurt?

A. I didn't know.

Q. You what?

A. I didn't know it, I was trying to get away.

Q. I can't hear what you are saying and I am sure the jury can't either.

(Testimony of Eleanora Gobert.)

A. I said I didn't pay much attention while I was trying to get away.

Q. You didn't pay much attention and all that, do you remember whether you bled?

A. When?

Q. After this so-called act of sexual intercourse?

A. No.

Q. You didn't bleed?

A. No, not that I can remember.

Q. You say that the act went on for about 5 minutes? A. 5 minutes or more.

Q. 5 minutes or more, have any idea how much more? A. No.

Q. You place it about 5 minutes and maybe a little bit more and that is all, 6 to 7 minutes?

A. Yes.

Q. During this 6 or 7 minutes did you say anything to Mr. Guith?

A. Well when he asked me how I felt I just said I didn't [50] know.

Q. When he asked you what?

A. How it felt I just said I didn't know.

Q. You just said you didn't know, is that the only conversation that went on between you?

A. Yes.

Q. Did you tell him to get off, warn him to get off?

A. I kept trying to get away and I couldn't.

Q. But you didn't say anything to him?

A. Nothing beside I didn't know.

Q. And then after he got through do you re-

(Testimony of Eleanora Gobert.)

member whether he had, whether he left any fluid or what we call spermatozoa around on your female organ?

A. I didn't pay any attention; I just got up and left.

Q. You got up and left? A. Yes.

Q. Did you pull up your panties? A. Yes.

Q. And that as I take it was the only thing, those were down around your ankles, is that right, and you just got up and left, was that before he told you you better go and pea?

A. After.

Q. It was after? A. Yes. [51]

Q. Did you ask him why you had to go and pea?

A. He said go pea so you won't get pregnant.

Q. So you won't get pregnant, is that what he told you, and did you go, did you go and pea?

A. No, I just got up and left for home.

Q. Well did you run home?

A. I couldn't. I had that battery on a sled.

Q. You hauled the battery on back, is that right? A. Yes.

Q. And when you got back to the house was your father there, your dad there?

A. Yes.

Q. What did you say to him?

A. I just went in and told him the charger was broken.

Q. You told him the charger was broken?

A. Yes.

Q. And that is all you said? A. Yes.

(Testimony of Eleanora Gobert.)

Q. You didn't tell him anything that Mr. Guith had done to you? A. No.

Q. And then as I have your testimony here you said you left right away, you put your clothing back on, is that the answer, you told Mr. O'Connell that you put your clothes back on? [52]

A. —Pulled my jeans up and snapped or zipped them and—

Q. By that you don't want to leave us with the impression that I got from your testimony in direct examination that the only thing you had on were your panties and your brassiere and then you got up and picked up your pants, your jeans and jacket and so on and put those on?

A. I already had my jacket on.

Q. You already had it on and all you did when you were telling Mr. O'Connell you were putting your clothes back on, what you actually did was to pull your jeans up from your ankles?

A. Yes.

Q. Now were your clothes torn? A. No.

Q. They weren't torn? A. No.

Q. Do you remember about what time you got back to the house, to your house?

A. It was between—

Q. This took place apparently some time around 12:30, about noontime on January 9th and took 5 or 7 minutes or maybe 10, and then you went directly home, is that correct, so you were home about one o'clock or before one o'clock?

A. Between quarter to one and one.

(Testimony of Eleanora Gobert.)

Q. Now all of this period then you never told anyone you [53] were pregnant? A. No.

Q. Who took you to the hospital at Browning?
A. Mommy and daddy.

Q. Your mother and dad? A. Yes.

Q. Why did they take you to the hospital at Browning?

A. Because my stomach and back were really hurting.

Q. They were really hurting you, did they examine your stomach and back?

A. They took X-rays.

Q. Well that is the hospital but I mean your mother and dad? A. No.

Q. They didn't? A. No.

Q. Where is this baby now?

A. She is at the motel where we are staying.

Q. She is where?

A. At the motel where we are staying.

Q. The motel here in Great Falls?

A. Yes.

Q. Will we be able to see the baby?

A. Yes, I guess so.

Q. And if possible if necessary can we make a blood test? [54] A. Yes.

Q. Can you tell the jury now whether the baby is dark as an Indian or shows any white features?

A. She isn't really dark and her hair is kind of getting light.

Q. Is she really dark? A. No.

Q. I mean does she show any white features or

(Testimony of Eleanora Gobert.)

features of the white race of having for instance a white father? A. Yes.

Q. In what way?

A. Her hair and her skin.

Q. Her hair and her skin. A. Yes.

Q. Now why did you go back these 3 or 4 other times? A. I went back to get gas.

Q. You went back to get gas? A. Yes.

Q. Well why did you go back as far as the sexual intercourse was concerned these 3 or 4 other times? A. What?

Q. Well you said you had intercourse, your testimony is you had intercourse within a 3 or 4 week period after January 9th 3 or 4 other times with Mr. Guith, is that your testimony? [55]

A. Yes.

Q. And those dates you don't remember?

A. No.

Q. You don't remember at all? A. No.

Q. But why, why did you go back?

A. I just went back after gas.

Q. I mean on those 3 or 4 occasions did Mr. Guith have to tear your clothes off?

A. He took them off himself.

Q. What?

A. He took them off himself.

Q. You mean you left him take your clothes off?

A. What?

Q. You left him take your clothes off?

A. Yes.

Q. Did you fight with him?

(Testimony of Eleanora Gobert.)

A. Oh, not as much.

Q. What? A. Not much.

Q. Not much, well I mean you knew what he had done to you on January 9th and when you went back again, before you went back who sent you back the other times your folks again?

A. I just asked daddy could I use his car so I got him gas. [56]

Q. You asked your dad if you could use his car if you got the gas and you went to get the gas at Mr. Guith's so you could go to town?

A. I didn't.

Q. Where did you go?

A. I went up to my brother's place and stayed there for a while.

Q. With your father's car? A. Yes.

Q. And how long were you gone?

A. I wasn't gone more than an hour.

Q. What?

A. I wasn't gone more than half an hour.

Q. How long? A. Half an hour.

Q. I thought you said you went up to your brother's place and stayed there for some time?

A. Went up there to listen to some of his records.

Q. You just went up there to visit?

A. To listen to some of his records.

Q. You listened to some of his records?

A. And play with his smallest girl.

Q. Did you stay over night or stay any period of time?

(Testimony of Eleanora Gobert.)

A. No, just about a half an hour and then I went back home. [57]

Q. So when you went to Chester Guith's to get the gas after this alleged occurrence on January 9th, you went on your own, you went there to get the gas for yourself? A. Yes.

Q. When you were going back home January 9th, 1954, after this occurrence took place did you see Mrs. Guith? A. No.

Q. Didn't see her at all?

A. She didn't get home until later that afternoon.

Q. She didn't get home until later that afternoon, how late? A. I don't know.

Q. You don't know how late, well, was it very late in the afternoon?

A. No, it wasn't real late.

Q. And did you see the two children around there at all? A. No.

Q. Do you know whether or not the car was there? A. No, it wasn't.

Q. The car was not there? A. No.

Q. Do you know Mr. Guith's car? Do you know what kind he had?

A. He had a blue 1949 Chevrolet.

Q. A blue 1949 Chevrolet? [58]

A. Yes.

Q. Is it all blue or a two-tone car?

A. It was all blue.

Mr. J. J. O'Connell: I think that is all.

(Testimony of Eleanora Gobert.)

Redirect Examination

Q. (By Mr. M. O'Connell): Eleanora, when you were in the tool shed with defendant Guith and you were on the floor and he got on top of you, your jeans were down around your ankles, is that right?

A. Yes.

Q. What was the position of your legs at that time?

A. They were doubled way up.

Q. They were doubled way up?

A. Yes.

Q. Were your knees doubled back against your chest?

A. No.

Q. Not that way?

A. No.

Mr. J. J. O'Connell: Don't lead her too much.

Q. About how far were they?

A. Doubled back.

Q. Doubled back?

A. Yes; my feet were still on the ground. [59]

Q. Your feet were still on the ground, and were your feet right close together or were they some distance apart?

A. They were quite a bit apart.

Q. Now these panties that you say you were wearing what type panties were they?

A. They were kind of loose around the legs.

Q. Do they have long legs on them?

A. No.

Q. Are they the very abbreviated kind, very short kind?

A. How do you mean, which?

Q. Well were they the regular, what kind of material were they made with, do you know?

(Testimony of Eleanora Gobert.)

A. I don't know just what kind of material they were made of.

Q. But how long were the legs on those panties?

A. They were just even.

Q. Would you answer that again, just how long were the legs on those pants?

A. They were just about even with the other part.

Q. What do you mean by that, about the same length? A. Yes.

Q. Eleanora, do you have dates with boys often?

A. No.

Q. Did you ever have dates with boys?

A. Never did pay any attention to them. [60]

Q. You what?

A. Never did pay any attention to them.

Q. Have you ever had a date with a boy?

A. No.

Q. Could you explain how defendant Guith got his male organ into your female organ around these panties?

Mr. J. J. O'Connell: To which we object on the ground it is repetition, already been gone into.

The Court: Well you went into that pretty much in detail; I think I will let him proceed.

Mr. M. O'Connell: Your honor, do you mean defense counsel went into it on cross examination or that I had gone into it previously?

The Court: No, that he had on cross examination, therefore, on redirect you can go over the

(Testimony of Eleanora Gobert.)

ground if there is something there you think should be further explained.

Mr. M. O'Connell: Answer the question.

A. In through the leg.

Q. Would you repeat that please?

A. In through the leg.

Q. Do you recall whether or not he had any trouble getting his organ into yours because of the panties? A. No, not much.

Mr. M. O'Connell: No further redirect, your honor.

Mr. J. J. O'Connell: Just a few questions. [61]

Recross Examination

Q. (By Mr. J. J. O'Connell): Eleanora, you had said that Mr. Guith was holding you, was holding your shoulders and so on, did he use his hand to get his sexual organ into your pants?

A. Yes.

Q. He did? A. Yes.

Q. Which hand? A. His right hand.

Q. His right hand and was this after he was holding your shoulders or what?

A. Before he got my shoulders.

Q. Before he got your shoulders?

A. I did have my shoulder on the side.

Q. Now I mean you very rarely wear a dress, isn't that correct, Eleanora? A. No.

Q. I mean have you worn a dress very much?

A. When I was, before I was in the 7th grade when I went to school quite a bit.

(Testimony of Eleanora Gobert.)

Q. I mean in the last, '54 and '55?

A. No.

Q. You wear jeans most of the time, isn't that right? [62]

A. Yes.

Q. Now where were those panties on—did your under panties come down to about here on you?

A. They came right about there.

Q. Right about here, would you just stand up and indicate to the jury?

A. They came right about there.

Q. Up in here? A. No.

Q. Down about here?

A. Just right about like that.

Q. And you don't remember what kind of material they were? A. No.

Q. Now what did you do with your arms while he was on top of you?

A. Had them down by my side and I couldn't get them loose.

Q. You had them down by your sides and you couldn't get them loose? A. Yes.

Q. How was he keeping them there?

A. He had his elbows.

Q. He had his elbows against them?

A. Yes. [63]

Q. Whereabouts on your body for instance?

A. Right by my side.

Q. Right along side just along the ribs in here?

A. Yes.

Q. Now when you told Mr. O'Connell you never had anything to do with boys or never had a date

(Testimony of Eleanora Gobert.)

with a boy you don't want us to understand you have never been out with a boy?

A. No, I never did really pay any attention to them.

Mr. M. O'Connell: I didn't hear that.

A. I never did really pay any attention to them.

Q. You mean you have never been out with a boy, is that what you are trying to testify?

A. No.

Q. You never have? A. No.

Q. Have you ever been into Cut Bank with your sisters in your dad's car and gone out with your sisters? A. No.

Q. You never have?

A. Neither of us had driver's license.

Q. I didn't get your answer.

A. Neither of us didn't have driver's license; he wouldn't let us use it alone on the highway.

Q. Have you been in to Cut Bank? [64]

Q. In your dad's car?

A. With my dad and that was all.

Q. And you didn't pick up some boys from the Airbase there at Cut Bank? A. No.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: No further questions.

The Court: Very well, call your next witness.

The Court: We will take a recess for 15 minutes.
(3:55 p.m.)

Court resumed, pursuant to recess, at 4:10 p.m., at which time the defendant, jury and all counsel were present.

The Court: Next witness.

Mr. M. O'Connell: Mr. H. C. Davis.

H. C. DAVIS

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. M. O'Connell): Would you state your name, please? A. H. C. Davis.

Q. Where do you reside?

A. Cut Bank, Montana. [65]

Q. And what is your occupation?

A. Superintendent of Schools.

Q. How long have you been so employed?

A. Since September, 1930; 25 year period.

Q. Now can you tell us when Christmas vacation started in the grade schools in Cut Bank in 1953? A. I can.

Q. When did it start?

A. It started on December 18th; our entire system of grades and junior high and high school all have the same period which is two weeks' period starting on the 18th and went to Monday morning January 4th, 1954.

Q. School resumed January 4th?

A. Correct.

Q. And do you recall what day of the week January 4th was? A. Monday morning.

Q. Do you know Eleanora Gobert?

A. Yes, sir.

(Testimony of H. C. Davis.)

Q. Was she going to school in Cut Bank at that time?

A. Yes, she was a student at the Cut Bank junior high; our junior high includes 7th and 8th grades.

Q. And do you know what grade she was in?

A. She was in the 8th grade.

Q. In the year 1953? [66] A. 1954.

Mr. M. O'Connell: No further examination.

Cross Examination

Q. (By Mr. J. J. O'Connell): Do you know whether or not she came back to school after the Christmas vacation?

A. Yes, our school register which I have in hand shows that she did come back after the Christmas vacation. She came back after the—just a minute until I check that through—she was absent on January 4th; however, she came, entered the 5th, 6th, 7th, was absent the 8th, and on through the month she missed one more day.

Q. Well then was she there February, March and April and so on?

A. Yes, she concluded the school year, finished the entire school year; the end of the school year, May 28th was the date the school closed that year in 1954.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: Nothing further.

Mr. M. O'Connell: I would like to call Dr. Edward King. [67]

DR. EDWARD L. KING

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. M. O'Connell): Would you state your name, please?

A. Edward L. King.

Q. And your residence?

A. Browning, Montana.

Q. And your occupation?

A. I am a physician.

Q. And how long have you been a physician at Browning?

A. I have been stationed at Browning for the last 23 months.

Q. Who do you work for at Browning?

A. I work for the United States Public Health Service. I am a medical officer detailed to the hospital at Browning.

Q. Where did you take your college work, doctor?

A. I hold a Bachelor of Arts Degree of Ohio University; I have my medical degree from Western Reserve University in Cleveland, Ohio, and my internship was at the United States Public Health Service Hospital at Baltimore, Maryland, which was a rotating internship.

Q. Have you been engaged in the general practice of medicine? [68]

A. Throughout the entire internship and since

(Testimony of Dr. Edward L. King.)

being at Browning I function as a general practitioner.

Q. And how long a period will that include?

A. That will include 35 months, almost three years.

Q. During that time will you tell us whether or not you have practiced any obstetrics?

A. Yes, a considerable part of our work at the Blackfeet Hospital is obstetric; we deliver anywhere from 15 to 30 babies a month. I would say since I have been there I have delivered probably 200 babies.

Q. Do you know Eleanora Gobert?

A. Yes, I am acquainted with her.

Q. Have you ever treated her?

A. Yes, I treated Eleanora on several occasions, mostly subsequent to her pregnancy. I treated her in August of 1954 and again at her delivery in October. From the records on the Blackfeet Hospital she was seen at the out patient clinic in April, 1954. In both April and August she was seen at the clinic regarding her menstrual irregularity. Actually first or I might say in April she was just having irregular periods, there were scanty periods up through March, and she was given some iron therapy. And when I saw her in August again it was a question of ceased menstrual periods, stop of menstrual periods and I did not do a very thorough examination but I could see no good reason why she should not [69] have menstrual periods. I suggested to her mother that the most common

(Testimony of Dr. Edward L. King.)

cause was pregnancy and asked her if she thought her daughter could be pregnant. The mother thought her daughter couldn't be pregnant, that she never went anywhere by herself except occasionally to baby sit for a neighbor.

Q. Now, doctor, you speak of the delivery of Eleanora Gobert, did you deliver a baby for her?

A. Yes, on October 2nd, the parents brought the child to the outpatient department, she was having severe abdominal pain and it was quickly apparent that she was pregnant. I listened for the fetal heart, heard it and took x-rays to make sure of the position of the baby's head, and she had a breeched delivery, a delivery roughly three hours after being admitted to the hospital.

Q. Now with reference to the baby's delivery could you express your opinion as to whether or not it was a full term baby?

A. The baby was full term, the weight was 7 pounds 11 ounces, if anything the baby was rather large and it may have been a week or so over term.

Q. Now you say you delivered her on October 2nd, 1954? A. Yes.

Q. Now, doctor, what is the period of gestation? Or, just a moment, first of all tell us what the period of gestation is? [70]

A. The period of gestation is from the time of the conception to the delivery, or roughly this was the period of time in which the infant grows in the mother's body.

Q. And what is the normal period of gestation?

(Testimony of Dr. Edward L. King.)

A. An average figure that is generally used is 280 days. This is an average figure, however, and we only calculate about 4% of our patients are delivered on that day, so 280 days after conception only about 4% are delivered but within a two week or more span on either side of this 280 days we expect about 96% of our patients to deliver.

Q. You mean that, do you, other than a normal birth if it were two weeks late or two weeks early on the 280 day period?

A. Yes, and sometimes even longer.

Q. You would call that full term?

A. Depending, of course, upon the weight and size and appearance of the child.

Q. Now did you figure back in days from the 2nd of October, 1954?

A. I did. From the 2nd of October back would place the time of conception roughly around the 24th of January.

Q. 24th of January?

A. That would be the 280 days. Now we can give a couple weeks on each side and still be within a statistical-wise range. [71]

Q. Well, now in your opinion, doctor, if a woman were conceived on the 9th day of January and she delivered her baby on the 2nd day of October of the same year, would that be a normal term?

A. I would figure that was a normal term for pregnancy.

Q. Now was there anything unusual about the way this pregnancy came to you?

(Testimony of Dr. Edward L. King.)

A. Well, as I said, I saw her six weeks before we delivered and it wasn't obvious that she was pregnant. As I said, I did not examine her abdomen; I feel confident if I had, I would have found the pregnancy.

Q. Doctor, do you know any reason why this particular pregnancy was not exposed?

A. The position of the fetus, the position of the baby, even at the time she came in to labor was not too obvious; the baby's head was drawn up under the ribs so it was lying in a linear position in a recess of the body.

Q. And what effect would that have on the pregnancy?

A. It would mask the pregnancy very considerably so it wouldn't be obvious to people.

Q. You mean it would hide the pregnancy?

A. Yes, it did hide the pregnancy.

Q. Is that common or uncommon?

A. Uncommon.

Q. How did you determine this particular baby's head [72] was under the ribs?

A. By the x-rays.

Q. I am now handing you an article which has been marked Plaintiff's proposed Exhibit No. 1; will you identify the article and tell us what it is?

A. This is an x-ray taken of the abdomen of Miss Eleanora Gobert on 10/2/54 at Blackfeet Hospital.

Mr. M. O'Connell: Your honor, I move that

(Testimony of Dr. Edward L. King.)

Plaintiff's proposed Exhibit No. 1 be admitted in evidence.

The Court: Any objection?

Mr. J. J. O'Connell: To which we object, your honor, not only to the admission of the x-ray but to this whole line of testimony on the ground there has been no connection laid by this testimony and the defendant Chester Guith.

The Court: Well it is a circumstance here; overrule the objection for the present anyway. It may be admitted in evidence.

Q. (By Mr. M. O'Connell): I now hand you, doctor, Plaintiff's Exhibit No. 1, which you have stated to be an x-ray taken of Eleanora Gobert, would you tell us what you can observe in that x-ray relative to any pregnancy that might have existed at that time?

A. From this x-ray I can observe that there is a baby present in her abdomen, that the baby's head is up under, the ribs are in the top part of the x-ray, and the baby's head [73] is up under the ribs. The backbone is located along the same access as the patient's backbone, and also that shows the baby's buttox goes into the pelvic and from this I can predict we are going to have a breech delivery, which we of course had.

Q. Doctor, do you know who made out the birth certificate when the child was born on October 2nd?

A. The birth certificates are made out, at our hospital all deliveries are made out by our receptionist who is our record librarian and she makes

(Testimony of Dr. Edward L. King.)

the birth certificates from information we put on the clinical chart, that the doctor puts on the chart.

Q. Did you obtain any information relative to the paternity of this child? A. I did not.

Q. You did not?

A. When she was in labor I asked her concerning the paternity of the child and she gave me no information whatever; this was at the time she was in labor.

Q. Did she at any time in the hospital give you any information relative to the paternity?

A. I do not recall any such information. Vaguely—well, I just don't recall enough that I could say.

Mr. M. O'Connell: That is all, you may cross examine.

Mr. J. J. O'Connell: No cross examination. [74]

The Court: Call your next witness.

Mr. Kerr: Gene Fopp.

GENE P. FOPP

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Frank Kerr): Would you please tell the court and jury your name and occupation?

A. Gene P. Fopp, Special Agent, Federal Bureau of Investigation.

Q. Mr. Fopp, did you have occasion to investigate the case now under consideration?

(Testimony of Gene P. Fopp.)

A. I did, sir.

Q. And approximately what was the first date that this case or this matter was called to your attention?

A. It was called to my attention either on October 11th or October 12th by Dr. King, and I went up and investigated on October 12.

Q. You went up to the Reservation on October 12?

A. Yes.

Q. On the day of October 12 would you please name the parties whom you talked to?

A. I talked to Chester Guith, the defendant. [75] I talked to Eleanora Gobert, her mother and father, and Dr. King, as I recall.

Q. And that was on?

A. On the 12th.

Q. On the 12th day of October?

A. Yes, sir.

Q. At what time did you talk to these persons, Edward Gobert and Guith and Eleanora, approximately what time of the day?

A. On the 12th I first talked to the parents of the girl, Edward Gobert No. 2 and Roselle, Mrs. Roselle Gobert, and then at 11:50 on the 12th I talked to the defendant, and then returned, incidentally I also talked to the girl before I talked to the defendant, then in order to clarify information as furnished by the defendant I returned on the same date and talked to all the Guiths concerned in this matter.

(Testimony of Gene P. Fopp.)

Mr. J. J. O'Connell: Guiths or Goberts?

A. All the Goberts; I am sorry.

By Mr. Kerr: Your honor, that is all we have of this witness but we would like to have permission to call him later. We are laying the foundation for another witness at this time.

The Court: Very well, you may excuse him for the time being. Call your other witness. [76]

Mr. Kerr: Have you any questions?

The Court: Any cross examination at this time?

Mr. J. J. O'Connell: No.

Mr. Kerr: Mr. Ed Gobert.

EDWARD GOBERT No. 2

was called as a witness by plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Frank Kerr): Will you please tell the court and jury your name and occupation?

A. Edward Gobert No. 2. Edward M. Gobert No. 2.

Q. What do you do, Mr. Gobert?

A. We live on a ranch.

Q. Where is the ranch?

A. On Seville Flat.

Q. Where is that in relation to Cut Bank?

A. It is about 10 miles out of Cut Bank.

Q. Is your ranch on the reservation?

A. Yes.

(Testimony of Edward Gobert No. 2.)

Q. Do you know where the Chester Guith ranch is?

A. Just about a quarter of mile west of us.

Q. Quarter of a mile west? A. Yes. [77]

Q. Are you familiar with the boundaries of the Blackfeet Indian Reservation? A. Yes.

Q. Do you know of your own knowledge whether or not the Guith ranch is within the confines of the Blackfeet Indian Reservation? A. Yes.

Q. Is it? A. Yes.

Q. Are you an Indian yourself, sir?

A. Yes.

Q. Which tribe? A. Blackfeet.

Q. And is Eleanora Gobert, the young lady just on the stand, I believe you saw her, is she your daughter? A. Who?

Q. Is Eleanora Gobert your daughter?

A. Yes.

Q. Has she lived with you up until this time at home? A. Yes.

Q. Now, Mr. Gobert, I am going to ask you to think back and try to recall in the fall of 1954 do you remember when your daughter had the child?

A. Yes.

Q. Now after the birth of this child did you have a [78] conversation with Mr. Fopp?

A. Yes.

Q. Did you hear Mr. Fopp testify just a moment ago and he testified that was the 12th of October; now can you place the time of this conversation by any events as to the approximate date?

(Testimony of Edward Gobert No. 2.)

A. You mean the time of the day?

Q. No, I was thinking more of the day, Mr. Fopp said that he talked to you on the 12th, did you talk to Mr. Fopp on the 12th? A. Yes.

Q. Now on that same day—well, let me withdraw that question and ask it another way—On the day of the 12th did you have any occasion to talk to the defendant Chester Guith?

A. Well he came up to my place.

Q. What time of day was that?

A. Oh, it was late in the afternoon.

Q. It was late in the afternoon? A. Yes.

Q. And who was present?

A. A boy of mine.

Q. Where in location to your house proper were you at the time? A. At the barn.

Q. You were at the barn and your boy was present, how [79] old is your boy?

A. 10 years old.

Q. Was there any conversation at that time between you and the defendant Chester Guith?

A. Yes.

Q. Would you please tell us what that conversation was?

A. Well he come into my barn crying, oh, like a baby and come in there and he says he didn't think he would ever have to come to me and apologize like the way he did, he said he didn't know whatever made him do that.

Q. At the time he said that did he illuminate

(Testimony of Edward Gobert No. 2.)

that, did he make it any clearer what he meant by that?

A. Well for what he did he says.

Q. Well was there any other conversation?

A. Well he was, he says he didn't know what ever made him do that, here he says I always admired the way you raised your daughters and he says now a s b like me comes along and spoils it.

Q. And was there any other conversation had that day?

A. Well he went on begging me to, well, he says that his wife he was trying to keep it from his wife, if his wife got hold of it she would get him.

Q. And was anything else said regarding this incident at that time?

A. Oh, he stood around there bawling like a baby. [80]

Q. Anything else?

A. And then after he got over that he got asking me different things that was plumb out of the question.

Q. Well about this same time did you see Mr. Guith on any other time in this same period?

A. If he came back?

Q. Yes, did he come back?

A. Yes, the next day he came back again and he says that, he asked me to take the baby to Helena and adopt it out and put the baby in the Orphans Home and I told him that was a darn hard thing to do and the baby was one of the family

(Testimony of Edward Gobert No. 2.)

and we just couldn't take her and throw her away.

Q. And did he say anything else?

A. He said to find out how much it would cost and he would give me the money and then he wanted me to go in and talk to my wife about it.

Q. Was anything further said?

A. Oh, he talked about different things after that.

Q. Now which day was that?

A. That was the next day.

Q. Where was that conversation, where did that conversation take place?

A. Right out by the house and in the yard.

Q. And was anyone else present?

A. No, there was nobody there; my family was inside. [81]

Q. Could they hear? Were they within hearing range?

A. No, I wouldn't know whether they could hear or not.

Q. Now Mr. Fopp came up on the 12th and that would be the first conversation and this one we just finished with would be on the 13th, it was the following day? A. Yes.

Q. Now were there any more conversations?

A. Yes, he came back again and he wanted——

Q. When did he come back again?

A. The next day.

Q. So that would be the 14th?

A. He wanted me to go around to the neighbors and tell the neighbors——

(Testimony of Edward Gobert No. 2.)

Q. Excuse me, I want to ask you a question. Where did this third conversation on the 14th take place?

A. Right out around the house in the yard.

Q. Anybody else present?

A. No, nobody right there, and my wife didn't want him inside, so she told me to go out there and talk to him.

Q. What did he say?

A. He asked me to get in the truck with him and go around to the neighbors and tell them this was not true, that he was doing this to protect Nora and himself.

Q. Was that all the conversation at that time?

A. I told him that I wouldn't do it because I would [82] be just making a damn liar out of me.

Q. Was anything else said?

A. No, that was all.

Q. Now did you have any conversations with Mr. Guith in regard to the baby since that time?

A. No.

Q. Has your daughter ever been married?

A. No, no, she never has.

Q. Has she ever lived with another man in a state of common law marriage or as man and wife?

A. No, we have never let her run around and whenever she went to show we took her.

Q. Has she had any dates with boys to your knowledge? A. No.

Q. Had she ever gone to town with other groups of girls?

(Testimony of Edward Gobert No. 2.)

A. No, she hardly ever goes to town; she never cared about going to town.

Mr. Kerr: That is all on direct.

Cross Examination

Q. (By Mr. J. J. O'Connell): Now, Mr. Gobert, you said you were familiar with the Blackfeet Reservation? A. Yes. [83]

Q. Do you know whether or not the Guith ranch is Indian Country?

A. Yes, it is on the Reservation.

Q. How do you know?

A. Well Cut Bank Creek is the boundary, and Birch Creek on the south side, and Canadian boundary.

Q. Do you know whether it is deeded land or not?

A. I don't know whether it is deeded land or not.

Q. Now you had a conversation with Mr. Fopp on October 12, 1954? A. Yes.

Q. How do you remember that particular day?

A. Well I remember the day when he came.

Q. I know, but how do you remember. I know you remember it but what do you tie it up with, what relationship, what connection and so on, any particular way you remember it was October 12th?

A. I remember the date he came; it was October 12th is the only thing I know about it.

Q. That was the day he came? A. Yes.

Q. Now you said it was on that day on the 12th

(Testimony of Edward Gobert No. 2.)

that Chester Guith came alone and talked to you the first time? A. Yes, the first time.

Q. As a matter of fact relations between you and Guith up [84] until that time had been very friendly, isn't that correct?

A. Well, yes, I have always treated him I thought he was a good friend of mine.

Q. I mean you interchanged situations as far as the ranch is concerned and gone over there for help and assistance and things of that kind, isn't that right?

A. Yes, I have worked for him and I have went up there.

Q. Now you said he came in crying like a baby?

A. Yes.

Q. Was he crying when he got to the house?

A. No, in the barn.

Q. Oh, in the barn; well, was he crying when he got there? A. Well, yes.

Q. Were there tears in his eyes?

A. Yes.

Q. What did he tell you he was crying about?

A. He was crying because he had to come in and apologize to us.

Q. Because he had to come and apologize to you? A. Yes, for what he did.

Q. Now did he say that Mr. Fopp had been to see him? A. Yes.

Q. He told you that Fopp had been to see him?

A. Yes. [85]

(Testimony of Edward Gobert No. 2.)

Q. Now didn't he as a matter of fact tell you that it was a lie? A. What?

Q. Didn't he as a matter of fact tell you this accusation made against him was a lie?

A. No, he didn't.

Q. Didn't you tell him as far as you were concerned it was a lie?

A. As far as I was concerned it was a lie?

Q. You didn't, you were sure he was the one that had done it, is that right? A. Yes.

Q. You didn't question the possibility of anybody else? A. No.

Q. I mean did you refuse, did you refuse to go around the neighbors as he suggested and tell them it was a lie? A. Yes.

Q. You didn't tell anybody up there that it was a lie?

A. No, I didn't tell them; I told them it was the truth.

Q. You didn't tell anybody that?

A. No.

Q. Now he said he had always admired the way you raised your kids; now you had had some difficulty with the kids?

A. Not that I know of.

Q. One daughter? [86]

A. One daughter, which one was that, that was my sister's daughter, wasn't it?

Q. You know better than I. A. Yes.

(Testimony of Edward Gobert No. 2.)

Q. Did you have a daughter in a house of prostitution? A. Prostitution?

Q. Yes. A. No.

Q. Well you know what a house of prostitution is? A. No, I never have.

Q. What? A. Never have had any.

Q. You never had what?

A. What did you say.

Q. Well didn't you have a daughter who was in a house of prostitution?

A. House of prostitution, what does that mean; you will have to explain that?

Q. Well I think the most popular way I could put it most men describe it as a whore house?

A. No, I never did have a daughter in a whore house.

Q. A daughter by the name of Mrs. Jackson?

A. Mrs. Jackson?

Mr. M. O'Connell: I object to that line of testimony, your Honor. [87]

The Court: Yes.

Mr. M. O'Connell: Improper cross examination.

A. You mean to say that I had a daughter that was a whore or something like that?

The Court: I sustained the objection.

The Court: Cut out any further examination along this line; it has nothing to do with this.

Q. (By Mr. J. J. O'Connell): Now was there any mention, any mention of money on the 12th of October?

(Testimony of Edward Gobert No. 2.)

A. No, he said he didn't have any on the 12th of October.

Q. He didn't what?

A. He didn't have any.

Q. Guith said he didn't have any money?

A. I told him I wasn't after his money.

Q. Didn't you hire an attorney at Shelby about trying to get money out of Guith?

A. Not me.

Q. Who did?

A. My wife went down there and talked to him; I wasn't down there.

Q. What? A. I wasn't down there.

Q. But you know your wife went down?

A. No, I never knew she went down until after she got back. [88]

Q. Until after she came back? A. Yes.

Q. Didn't you go to Mr. Aronow in Shelby?

A. Pardon me?

Q. Didn't she go to Mr. Aronow in Shelby?

A. I guess she did.

Q. And the purpose of that was to get money out of Guith, isn't that right?

Mr. M. O'Connell: Objected to, your Honor, because this appears to be all hearsay of Mrs. Gobert.

A. I never was after Guith's money.

The Court: It is so far as this witness is concerned certainly. Are you going to object to it?

Mr. M. O'Connell: Yes, sir.

The Court: Sustain the objection.

(Testimony of Edward Gobert No. 2.)

Q. (By Mr. J. J. O'Connell): You personally never talked to Mr. Aronow at any time?

A. Never have.

Q. Never have, never talked with him about getting any money from Guith? A. No.

Q. Did you talk to Guith about paying any money? A. No.

Q. And when did this discussion come up in which he [89] said he had no money?

A. Well he come in there crying and he said he didn't have no money; that is what he told me, but he wanted to get me to take the baby to an Orphans home.

Q. I mean was there discussion with him about the kind of property he had at that time?

A. No.

Q. You didn't discuss with him how much real estate he had, how much farm machinery?

A. No, I was not asking for no money at all.

Q. What was your reaction towards Mr. Guith inasmuch as you felt he was guilty of this?

A. Well the way I figured I think he should be punished.

Q. You said what?

A. I think he should be punished the same as anybody else; I am not after his money or anything.

Q. Did you protest to him about what he had done? A. No.

Q. Didn't try to strike him or anything?

A. No, that isn't my habit.

(Testimony of Edward Gobert No. 2.)

Q. Did he say what Orphanage he wanted this baby taken to? A. He didn't say.

Q. He didn't say, and there were just you and he present, is that correct?

A. The boy when he wanted to take the baby to an [90] orphanage; just him and I was out there, my family was inside.

Q. Then he came back again on the 14th of October, is that correct?

A. Yes, he came the 12, 13 and 14th.

Q. On the 12, 13 and 14th he came around?

A. Yes.

Q. And that is when he wanted you to get in the truck with him and go around and tell the neighbors it wasn't true? A. Yes.

Q. Do you remember whether or not he told you he was being made a goat for something he hadn't done?

A. No, he said he wanted to protect himself and he wanted to protect Eleanora; he said he wanted to stop the talk that was going around.

Q. He wanted to stop the talk going around?

A. Yes.

Q. Now your testimony is your daughter has never been out with other boys?

A. Never has; we never allowed that.

Q. Do you know she goes into school in Cut Bank?

A. Yes; she comes right back on the bus.

Q. Well now she is in Cut Bank for some time?

A. Yes, we see that she goes to school.

(Testimony of Edward Gobert No. 2.)

Q. You say at any time she has never gone into Cut Bank on any other occasions except school?

A. No, not unless we take her.

Q. Unless you take her; she has never gone in with your other daughters?

A. No, we never allow the other daughters to go into Cut Bank either unless we are with them, very seldom.

Q. Did you say except very seldom?

A. Yes, very seldom the other girls ever went into Cut Bank.

Q. Well do they go to the theatre or go to show?

A. Yes, we take them in town to the show.

Q. Do they go to any dances?

A. We take them and wait for them to come out.

Q. Do they go to any dances? A. No.

Q. Do they go to any dances in the community hall there where you live? A. No.

Q. Do you know whether they have gone in with—you have a son by the name of Ralph—have they? A. Yes.

Q. Have they ever gone in with Ralph?

A. Yes, they go in with Ralph.

Q. How old is Ralph? A. Ralph is 21.

Q. He is 21 and he never lets them go around?

A. He said he wouldn't.

Q. He told you he wouldn't, but you haven't?

A. I know because I can trust him; I can trust Ralph any place.

Q. Does Ralph go out with girls?

(Testimony of Edward Gobert No. 2.)

A. Ralph is a married man and has three children.

Q. Did he go out with girls before he was married?

A. Before he was married I suppose he did.

Q. Are any of your daughters married?

A. Yes, I have two married in Seattle.

Q. Did they ever go out with anybody before they were married?

A. No, not until they became of age.

Q. Not until they became of age?

A. Yes, that is one thing we never did do is let our daughters run around loose.

Q. You have a daughter just slightly older than Eleanora?

Mr. M. O'Connell: Objected to, your Honor, as improper cross examination.

The Court: Well I don't know what he has in mind; he can answer the question.

Q. You have a daughter which is older than she don't you?

A. Yes, just a little bit older.

Q. Doesn't she and Eleanora go out together?

A. No. [93]

Q. They have never gone up to what they call the shacks?

A. Shacks, where is that?

Q. The cabin up in the mountains?

A. No, Eleanora never has went up there; never did go up there; the older girl went up there with a friend of hers, with Cruses.

(Testimony of Edward Gobert No. 2.)

Q. With who?

A. Cruse, he had a cabin up there in the mountains and she went up there and she was real good friends with their daughter and they always took care of her, Mr. Cruse and his wife.

Q. And Eleanora didn't go with her?

A. No, Eleanora always stayed with us.

Mr. O'Connell: That is all, your Honor.

The Court: Any redirect?

Mr. M. O'Connell: No redirect.

The Court: Have you got a short witness, one more?

Mr. M. O'Connell: Your Honor, plaintiff rests.

The Court: How many witnesses have you got, Mr. O'Connell?

Mr. J. J. O'Connell: I didn't get your question, your Honor.

The Court: How many witnesses will you have probably.

Mr. J. J. Connell: I would say we would have about six; there are only about two of those that would be of any length. [94]

The Court: We will have a problem to finish by Saturday.

Mr. J. J. O'Connell: Oh, yes, I think we will finish by then.

The Court: Well, we can call it a day and suspend.

Whereupon the court duly admonished the jury. Court adjourned at 5:00 p.m. on June 9, 1955. [95]

Court resumed, pursuant to adjournment, at 10:00 o'clock a.m. on June 10, 1955, at which time the jury, the defendant and counsel for plaintiff and defendant were present.

The Court: Good morning, ladies and gentlemen.

The Court: Now, gentlemen, are you ready to proceed. Mr. O'Connell?

Mr. J. J. O'Connell: Your Honor, I desire to make a motion which under the rules requires it be made outside the presence of the jury.

The Court: Ladies and gentlemen of the jury, we have some legal questions to talk over and will you please retire to the corridor and the Marshal will find some accommodations for you while this discussion is going on in here; it is necessary you be outside of the hearing of what goes on in the courtroom.

(Whereupon the jury retired from the courtroom.)

The Court: Very well, Mr. O'Connell.

Mr. J. J. McConnell: May it please the court. Comes now the defendant and moves the court for a judgment of acquittal on the evidence on the following reasons:

1. That the Government has failed to prove completely that the Guith ranch at which the crime alleged at the time of the indictment was allegedly committed is in Indian Country as alleged in the indictment.

2. That the Government has failed to prove the crime charged in the indictment in that there has

been no proof [96] of penetration of the female sexual organ of the prosecutrix in the case.

Oral arguments were made by counsel for the defendant and by counsel for the plaintiff.

The Court: I am satisfied that there isn't any merit in either contention in those motions and in order to save time I will overrule the motion and you may bring in the jury.

The jury was returned to the jury box.

The Court: Mr. O'Connell, you may proceed with your statement to the jury.

Mr. J. J. O'Connell made a statement of the defense to the jury.

Mr. J. J. O'Connell: Call Mrs. Lillian Guith.

LILLIAN GUTH

was called as a witness for the defense and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. J. J. O'Connell): Now, Lillian, will you speak up loudly enough so that the jury will be sure to hear you and the court will be sure to hear you and the counsel back here at the table and talk to the jury so they can hear your story. Will you state your name, please?

A. Lilliam Guith. [97]

Q. And where do you reside, Lillian?

A. About 10 miles west of Cut Bank.

The Court: Mr. O'Connell, she must talk louder: the jury must hear her.

Mr. J. J. O'Connell: Lillian, you will have to talk up and don't be afraid to talk up and try to

(Testimony of Lillian Guith.)

talk at least as loudly as I am so that they can hear you.

Q. (By Mr. J. J. O'Connell): I think you said you reside 10 miles west of Cut Bank?

A. Yes.

Q. Are you related in any way to the defendant Chester Guith? A. Yes, wife.

Q. You are his wife?

A. Yes.

Q. And for how long have you and he been married? A. 13 years.

Q. What has been the nature of your marriage?

A. We have been both happy.

Q. You have both been happy, I mean have you had any difficulties with your husband, Mr. Guith, as far as any other women are concerned? Infidelity or anything of that kind? A. No.

Q. Now you were present and sitting in the court room here all day yesterday while the testimony was produced by the [98] Government, were you not? A. Yes.

Q. And you heard all the testimony that was given? A. Yes.

Q. Now calling your attention to January the 9th in 1954, which is the date alleged in the indictment of the offense here and which is the date adduced in the proof by the government as the date of this alleged offense, can you recall the date of January 9th, 1954? A. Yes.

Q. Will you tell the jury how you recall that date?

(Testimony of Lillian Guith.)

A. Well since this matter came up we started wondering what we did on January 9th and tried to check on it and I have always kept a diary and I looked in my diary on January 9th, 1954, and I see what we done that day.

Q. For how long have you kept a diary, Mrs. Guith?

A. Ever since we have been married.

Q. Ever since you have been married?

A. Yes.

Q. And how have you kept that diary?

A. I write in it every day things of interest to us.

Q. Was there any particular reason why you kept a diary? A. No.

Q. I mean did you want it for any particular purpose or was it for your amusement or for your information? [99]

A. Just because I started writing in it and it seemed interesting to read each year what we done.

Q. Do you recall whether you kept that diary in a one year diary book or a five year diary book or over what time?

A. The one for 1954 was a five year diary book; when I first started I just wrote on a notebook.

Q. You will have to speak up.

A. My first diary was just a notebook and this last diary it is a 5 year diary.

Q. Lillian, showing you what has been marked for identification as Defendant's Exhibit 2, I will ask you if you will tell the jury what that is?

(Testimony of Lillian Guith.)

A. This is my 5 year diary.

Q. And is this the diary that has been kept by you all the time indicated in there?

A. Yes, it is.

Q. And is all of the handwriting contained in there, is that your handwriting? A. Yes.

Q. Will you tell the jury what five years this diary covers? A. '51, 51, 52, 53 and 54.

Mr. J. J. O'Connell: We offer the exhibit.

Mr. M. O'Connell: Your honor, may we have a brief recess to look this over? [100]

The Court: Yes. We will take 10 minutes recess. (10:35 a.m.).

Court resumed, pursuant to recess, at 10:45 a.m. at which time the defendant, the jury and the counsel for plaintiff and defendant were all present.

The Court: Well, if you haven't had sufficient time to examine it, you can look at it during the noon hour.

Mr. M. O'Connell: We have had sufficient time, your honor. I would just like to ask the witness a couple questions about that diary.

The Court: Very well.

Q. (By Mr. M. O'Connell): Mrs. Guith, when in the day did you make entries in this diary?

A. I beg your pardon.

Q. When did you make the entries in this diary?

A. You mean for the past day usually; well, I, like for today I make that entry tonight and if I didn't think of it tonight, I would do it tomorrow morning.

(Testimony of Lillian Guith.)

Q. What sort of pen do you use?

A. Sometimes a Schaeffer fountain pen or ballpoint or anything I pick up.

Q. How many pens do you have?

A. I have about four ballpoints and a Schaeffer fountain pen; they are usually laying on our writing desk. [101]

Q. You have about four ballpoints and a Schaeffer?
A. Yes.

Q. Which do you use the most?

A. Both of them.

Q. Which did you like the best?

A. The Schaeffer fountain pen is usually dry.

Mr. M. O'Connell: That is all I have, your honor, and I have no objection to the admission of defendant's proposed Exhibit No. 1.

The Court: Very well, it may be received in evidence.

Q. (By Mr. J. J. O'Connell): Calling your attention to Defendant's Exhibit No. 1 and calling particularly your attention to the entry made on January 9th, 1954, did you make that entry?

A. Yes.

Q. And was that made of your own knowledge from your own knowledge?
A. Yes.

Q. You had knowledge of the facts?

A. Yes.

Mr. J. J. O'Connell: Your honor, may I read the entry to the jury?

The Court: Yes.

Mr. J. J. O'Connell: The entry in the Defend-

(Testimony of Lillian Guith.)

ant's [102] Exhibit No. 1 brings the years on down, '50, 51, 52, 53 and 54, and on January 9th, 1954, the entry reads: "Us 4 went to town. LeRoy & Chet went to Basketball game Shelby and C. B." C. B. it says rather than Cut Bank. Then goes on and says: "C. B. won".

Q. And you made that notation, do you remember about when you made it?

A. It was probably the next day, or one or two days after.

Q. You think you made it the next day or one or two days after? A. Yes.

Q. I want to ask you did you make that notation after your husband had been charged with this crime?

A. No, because I keep my diaries up.

Q. You keep the diary up, do you remember about when your husband was charged with this crime, when was the first time he was ever accused of it?

A. It was the last of October.

Q. In October of '54? A. Yes.

Q. Now in that diary you say that us 4 went to town, when you say us 4 went to town, whom do you mean?

A. Chet, LeRoy, Linda and I.

Q. Speak up so the jury can hear you and don't run through them so fast. Who were the four? [103]

A. My husband, Chet, and LeRoy and Linda and myself.

Q. And by your husband "Chet" you mean the

(Testimony of Lillian Guith.)

defendant here, Chester Guith? A. Yes.

Q. Do you now recall about what time you went to town—Well, let me ask you before that do you remember about what time you got up that day?

A. Oh, around eight o'clock.

Q. About eight o'clock in the morning?

A. Yes.

Q. And then after eight o'clock what did you do?

A. We had breakfast and Chet and LeRoy went out and done chores.

Q. Do you know what Chet did after breakfast of your own knowledge?

A. I could see him through the kitchen window; they were feeding the cattle.

Q. And you say Chet and LeRoy, that is the boy?

A. Yes.

Q. Do you know about how long they took to feed the cattle? A. Oh, about an hour.

Q. About an hour do you know about how many cattle they had to feed? A. Around 40 head.

Q. About 40 head and it took about an hour to do that, about what time of day would you say they finished that job?

A. It must have been between ten and ten thirty.

Q. Between ten and ten thirty?

A. I suppose.

Q. Then after they completed that chore then what happened, tell the jury what happened?

A. We got ready and were going to go to town

(Testimony of Lillian Guith.)

and that is when my husband's brother came down to get one of his cows that came down there.

Q. And what is your husband's brother's name?

A. Clifford Guith.

Q. Clifford Guith and he came to your house about what time?

A. I didn't see when he came; he was there when we got ready to go to town; it must have been about ten thirty.

Q. Around ten thirty? A. Yes.

Q. Well about what time did you leave for town, if you know? A. Around eleven o'clock.

Q. Around eleven o'clock, and how did you go to town, by what conveyance? A. By car.

Q. Is that your husband's car? [105]

Q. Now who did the driving on that particular day? A. My husband, Chet.

Q. And that is the defendant here, Chester Guith? A. Yes.

Q. And do you remember what kind of a day it was?

A. It wasn't warm; it wasn't cold.

Q. And he and you and the two children went on into town, into Cut Bank? A. Yes.

Q. About how far is that?

A. About 10 miles.

Q. Do you know about what time you got into Cut Bank?

A. It would be about 11:30, I suppose.

Q. About 11:30 in the morning? A. Yes.

(Testimony of Lillian Guith.)

Q. And where did you first go in Cut Bank when you got there?

A. Went to the Postoffice and the children and I got off to get the mail before the postoffice closed on Saturday.

Q. The postoffice closed on Saturdays?

A. At 12:30 on Saturdays.

Q. At what time? A. 12:30.

Q. About what time did you leave the postoffice, if you know? [106]

A. Between 11:30 and 12:00.

Q. Yes, and then——

Mr. M. O'Connell: What time was that?

Q. They didn't get the answer, the Government counsel didn't get your answer what time did you leave the postoffice?

A. Between 11:30 and 12:00.

Q. And from the postoffice where did you go?

A. We went down to the Wagon Wheel Cafe.

Q. To the Wagon Wheel Cafe, is that a restaurant in Cut Bank? A. Yes.

Q. Is it located in the business district there?

A. Yes.

Q. Now where did your husband go if you know; was he with you?

A. He took the car down to Northwestern Service.

Q. You will have to speak up again. He took the car where?

A. To the Northwestern Service garage.

Q. And where did you next see him then?

(Testimony of Lillian Guith.)

A. Shortly before twelve he came up to the Wagon Wheel Cafe.

Q. Shortly before noon he, around noon he came to the Wagon Wheel Cafe? A. Yes.

Q. And he met you and the two children there?

A. Yes.

Q. And then did you eat there, did you have lunch there, dinner, as you may call it?

A. Yes, we did.

Q. About how long did that take?

A. Take about an hour.

Q. That by the time you were served and the time you ate it took about an hour, is that correct?

A. Yes.

Q. Are you sure, you feel very sure about that that it took about an hour?

A. It always does in a restaurant, you wait.

Q. Do you have any idea what time you got out of the Wagon Wheel Cafe, what time you left there?

A. I would say around one o'clock.

Q. Around one p.m. in the afternoon?

A. Yes.

Q. And was Mr. Guith with you, your husband with you between noon, about the time noon and the time you left there, and you left at one o'clock, was he there all that time? A. Yes.

Q. And he ate his lunch with you?

A. Yes.

Q. From the Wagon Wheel Cafe where did you go?

A. Down to the drug store and done some shop-

(Testimony of Lillian Guith.)

ping and [107] went to Safeway and picked up some groceries.

Q. Do you remember what drug store you went to? A. Public Drug.

Q. Public Drug store in Cut Bank?

A. Yes.

Q. Was your husband with you when you went to the drug store? A. Yes.

Q. Did you make some purchases there in the drug store? A. Yes.

Q. From the drug store then where did you go?

A. Safeway store.

Q. The Safeway grocery store? A. Yes.

Q. And was you husband along with you?

A. Yes.

Q. And what purchases did you make there?

A. Bought groceries for the following week.

Q. You bought groceries for the following week, now have you any idea, could you give the jury any idea of the time, what time that consumed about; for instance, what time was it when you finished shopping at the Safeway grocery store?

A. I would say between three and four.

Q. Between three and four? [108]

A. Yes.

Q. Were you in the drug store quite a long time?

A. About an hour.

Q. Is that a large drug store? A. Yes.

Q. I mean it sells other things besides drugs, is that correct? A. Yes.

(Testimony of Lillian Guith.)

Q. And your husband Chester Guith was with you all that time? A. Yes.

Q. Then when did you pickup the car or do you know when the car was picked up?

A. He went back to Northwestern Service and got the car while I stayed down at the Safeway store.

Q. Did he come back to the store with the car?

A. Yes.

Q. And you put your groceries and that in the car? A. Yes.

Q. And then did you go home or did you go some place else?

A. Well we had some eggs to deliver to friends in town.

Q. You had some eggs to deliver? A. Yes.

Q. Do you know to whom you delivered those eggs?

A. To Mrs. Clyde Williams and Mrs. Don Presnell. [109]

Q. You will have to speak up louder.

A. Mrs. Clyde Williams and Mrs. Don Presnell.

Q. Do you know then after you got finished delivering the eggs to Mrs. Williams and Mrs. Presnell, do you know then did you go on home to your farm? A. Yes.

Q. And do you know about what time you got to the farm?

A. Between five and five thirty.

Q. Between five and five thirty, did you have dinner or supper then? A. Yes.

(Testimony of Lillian Guith.)

Q. And I note in the diary that you say your husband and LeRoy went to the basketball game?

A. Yes.

Q. And about what time did they leave?

A. Between seven thirty and eight.

Q. Between seven thirty and eight, were you awake when they got home that evening, that night?

A. I don't recall.

Q. Now you heard—well, they did come home that night? A. Yes.

Q. In the ordinary time after a basketball game would you say? A. Well, yes.

Q. Now do you know the complaining witness here, the [110] prosecutrix, Eleanora Gobert?

A. Yes.

Q. Have you seen her any number of times?

A. Yes.

Q. Has she come to your home and to your farm?

A. Yes.

Q. Would you say whether it was regularly or frequently or what?

A. Sometimes frequently, sometimes not too frequently.

Q. I mean did you of your knowledge see anything unusual or wrong going on between your husband and Eleanora Gobert at any time?

A. No.

Q. Have you asked you husband whether or not he committed this crime? A. Yes.

Q. Has he admitted or denied that he committed the crime?

(Testimony of Lillian Guith.)

Mr. M. O'Connell: Objected to, your honor, as hearsay.

The Court: Let her answer the question whether he ever denied it or admitted it.

Q. (By Mr. J. J. O'Connell): The question is has he ever denied or admitted this crime to you?

A. He denied it. [111]

Q. Has he always denied it? A. Yes.

Mr. J. J. O'Connell: That is all, your honor.

Cross Examination

Q. (By Mr. M. O'Connell): Mrs. Guith, regarding this diary of yours and the references which you have made concerning your activities in town on January the 9th, in 1954, how long did it take you to reconstruct the events of that day?

A. That is the usual procedure every time we go to town.

Q. In other words, you are telling us what you did on that particular day because that is what you did every time you came to town on Saturdays, is that right? That is true, isn't it? Is it?

A. I was just thinking how you worded your question.

Q. I am just asking you if what you said you did when you went to town on January 9th was said by you just because you did the same thing every time you came into town? A. Yes.

Q. And you have no independent recollection of what you did on January 9th, is that right? In other words, you have testified what you did on

(Testimony of Lillian Guith.)

January 9th and you have told us the reason that you remember is because you told us that you did [112] the same thing that day that you always did when you went in to town? A. Yes.

Q. But you don't specifically remember what you bought in the Public Drug on January 9th, do you?

A. Not offhand; I could check it back.

Q. What is that?

A. Not offhand; I can check it back in my account books.

Q. Do you have the account books with you?

A. No.

Q. Do you recall what you bought at Safeways on that day?

A. General line of groceries that I buy every weekend.

Q. But you have no recollection of what you did in the store that day, have you?

A. If there was anything unusual, I would have marked it down in my diary with anything the same on the happenings every day I don't write it down unless it is something extraordinary or unusual.

Q. What I am getting at, Mrs. Guith, you have given us a very careful accounting of your time on January 9th from the time you got out of bed at eight o'clock in the morning until your husband came home from the basketball game that night, that is right, isn't it? A. Yes.

Q. And then you tell me that you can give that careful [113] accounting because it is what you do every week? A. Yes.

(Testimony of Lillian Guith.)

Q. Now do you go to the Public Drug every week? A. Yes.

Q. What do you do there?

A. If I don't buy anything, I buy my little girl a milkshake or something.

Q. But the Public Drug is one of your stops every week? A. Yes.

Q. How often do you get to town?

A. Every week.

Q. How often does your husband get in town?

A. I don't keep track how often he goes.

Q. Does he go every time you go? A. No.

Q. And who does he usually go with?

A. On weekends I go by myself during the summer when he is in the field.

Q. And who do you usually go with in the winter time?

A. My husband drives the car.

Q. And who else goes to town?

A. Usually both the children.

Q. Do any of your husband's relatives ever drive into town?

A. Not many, no. [114]

Q. But you do drive the car yourself?

A. Yes.

Q. Do you ever take anyone other than the children to town when you go?

A. If anybody wants to ride with me, yes.

Q. Who do you take most often besides the children?

(Testimony of Lillian Guith.)

A. Not anybody most often; I have occasionally taken my sister-in-law with me to town.

Q. You said that you know Eleanora Gobert, do you know her quite well? A. Oh, yes.

Q. Did you ever hire her as baby sitter?

A. Yes.

Q. How often? A. Not very often.

Q. Were you hiring her during the year 1954 as a baby sitter?

A. I think we did a few times.

Q. Did you hire her during the year 1953 as a baby sitter? A. A couple times.

Q. And how did she get home when you did come home after she had been baby sitting?

A. We took her home.

Q. You took her home? A. Yes. [115]

Q. Who took her home?

A. My husband took her home.

Q. Your husband? A. Yes.

Q. What did you do at the Postoffice in Cut Bank on January 9th? A. Got our mail.

Q. You what? A. Got our mail.

Q. Do you remember what mail you got?

A. No.

Q. Do you remember seeing anybody in the post-office you knew? A. No.

Q. You said that your husband denied committing an act of rape on Eleanora Gobert, did he volunteer this information to you?

A. I asked him.

Q. You asked him, how did you find out that

(Testimony of Lillian Guith.)

he had been charged? A. He told me.

Q. He told you, isn't it true that you take the car quite often and go into town with the children leaving your husband at home?

A. Go in whenever I have to go in. [116]

Q. Quite often is it not?

A. Well, once a week isn't quite often I don't think.

Q. Do you go once a week? A. Yes.

Q. And do you leave your husband at home on some of those occasions alone?

A. If he is home alone, he is usually in the field; when I go in alone is when he is in the field and has field work to do.

Q. Mrs. Guith, if I were to ask you if I were to hand you the diary which is in evidence and ask you what you did on January 7th and 8th and 10th, could you reconstruct events of the whole day from that diary entry?

A. You mean let me read what I wrote in there?

Q. Oh, yes, with the diary in your hand?

A. A lot of my entries I could tell you what I did every day, depending on how I wrote them up.

Q. Could you tell us what you did on every hour of the day as you did about the 9th?

A. Practically.

Q. You say that because you do the same things every day? A. Just about, yes.

Q. And that is the reason you tell me?

A. Yes. [117]

Q. Is it true you do almost the same things every

(Testimony of Lillian Guith.)

day with some changing of pattern from day to day?

A. Naturally there would be some change, you wouldn't do everything on that same hour.

Q. And if there was a change in the pattern on a certain day, you couldn't tell me by looking at the diary entry, could you?

A. If there was anything very outstanding happening that day, I could because I would have marked it down.

Q. Do you usually go to town on Saturday?

A. Friday or Saturday.

Q. Friday or Saturday and what time do you usually leave the ranch for town?

A. Sometimes right at forenoon, sometimes I wait until after Linda's nap.

Q. Isn't it true you usually leave in the afternoon, or around noon?

A. However it may be, if I decide to let her have her nap first.

Q. What time does she take her nap?

A. Between one and three.

Mr. M. O'Connell: No further cross examination.

Redirect Examination

Q. (By Mr. J. J. O'Connell): Lillian, do you drive the car to town usually in the winter months?

A. No.

Q. Why not?

A. The highways are usually slippery and it makes me nervous.

Q. Why don't you drive in the winter months?

(Testimony of Lillian Guith.)

A. Because the highways are usually icy and I am too nervous and I won't drive anywhere in the winter.

Q. And in the course of the pattern of your ordinary life you live as a farm woman, as a farm wife, in the winter months is it true or is it not that your husband usually goes to town with you?

A. He always goes to town with me in the winter time.

Q. Now the times you drive the car are in the nicer seasons of the year and when he is in the field, is that correct? A. Yes.

Q. Now you were asked about your recollection of the things that went on on January 9th, 1954, and particularly with reference to the way you fixed the hours, I mean from the kind of life you live could you pretty generally set those [119] hours each day? A. Yes.

Q. And the things that you have told the jury here about January 9th, 1954, and the hours are those as you remember them and recall them, is that correct? A. Yes.

Q. And you usually go to town on what days?

A. Friday or Saturday.

Q. Friday or Saturday. do you know what day January 9th, 1954 was? A. Yes.

Q. What day was it? A. Saturday.

Mr. J. J. O'Connell: That is all.

Recross Examination

Q. (By Mr. M. O'Connell): Mrs. Guith, do you

(Testimony of Lillian Guith.)

remember what the condition of the roads was on that particular Saturday, January 9th?

A. I don't believe they were very bad.

Q. And during the winter when the roads are not very bad you quite often drive to town, do you not?

A. Only if the highways were bare and it had been chinooking. [120]

Q. I didn't hear you.

A. Only if it had been chinooking and if the highway was bare and dry.

Q. How far is your home from the highway?

A. Two miles.

Mr. M. O'Connell: That is all.

Redirect Examination

Q. (By Mr. J. J. O'Connell): Is that two miles to the highway, is that paved road or improved road?

A. No, it is just a graded road.

Q. And do you remember whether or not there was any snow on January 9th, 1954?

A. There was some, yes, some but I don't recall.

Q. Was there some snow, do you recall?

A. Yes.

Q. Do you have any idea, do you remember yesterday Miss Gobert testified that there was about a foot of snow, do you remember her testimony to that effect?

A. Yes.

Q. Would you say whether or not there was a foot of snow?

(Testimony of Lillian Guith.)

A. As I recall last winter I don't recall we had a foot of snow in January. [121]

Q. Was it less than that?

A. I think so.

Q. Do you remember the condition of the highway whether it was slick or what the condition of it was on January 9th? A. No.

Q. You do not? A. No, I don't recall.

Mr. J. J. O'Connell: Nothing further.

Mr. M. O'Connell: That is all.

Mr. J. J. O'Connell: Call Mr. John Flaget.

JOHN FLAGET

was called as a witness for defense and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. J. J. O'Connell): Will you state your name, please? A. John Flaget.

Q. And, Mr. Flaget, where do you reside?

A. Cut Bank.

Q. And what is your occupation?

A. Mechanic.

Q. What kind of a mechanic?

A. Automotive and tractor. [122]

Q. Do you operate a particular establishment in Cut Bank? A. Northwestern Service.

Q. And how long have you been with Northwestern Service? A. Since '49.

Q. Since '49? A. Yes.

Q. Do you know the defendant Chester Guith?

(Testimony of John Flaget.)

A. Yes.

Q. How long have you known Chester Guith?

A. Oh, somewheres in the neighborhood of 15 or 20 years.

Q. About 15 or 20 years; are you related in any way to Chester Guith? A. No.

Q. I didn't get your answer? A. No, sir.

Q. Can you recall or have you been asked to recall the date of January 9th, 1954?

A. Yes, I have.

Q. And in that connection I mean do I presume you keep records in your position in the Northwestern Service? A. Yes.

Q. And did you check those records?

A. Yes, sir.

Q. And particularly with respect to January the 9th, 1954? [123]

A. Yes, I did.

Q. Can you state whether or not from your recollection and from your knowledge whether or not Chester Guith came to your place on business on January 9th, 1954?

Mr. M. O'Connell: We object, your honor, as not the best evidence; he stated he checked the records and he is going to testify now without anything in his hand of what occurred on January 9th, 1954, from information he gathered from his records.

The Court: He has no records with him?

Mr. M. O'Connell: Not the best evidence, no proper foundation.

The Court: Sustain the objection.

(Testimony of John Flaget.)

Q. (By Mr. J. J. O'Connell): Mr. Flaget, showing you what has been marked for identification purposes as Defendant's Exhibit No. 3 I will ask you if you can tell the jury what that is?

A. It is a work order for repairs and work from the Northwestern Service.

Q. And did you personally make that record?

A. Yes.

Q. Is that record in your handwriting?

A. Yes, it is.

Q. And made and prepared by you in the regular course of business? [124]

A. Yes.

Q. And for whom is that work order made?

A. Chet Guith.

Q. Is that Chester Guith the defendant here?

A. Yes, sir.

Q. And did that involve repairs on the car of Chester Guith? A. Yes.

Mr. J. J. O'Connell: We offer it in evidence, your honor.

Q. (By Mr. M. O'Connell): Mr. Flaget, what did you do with the originals of these orders?

A. We have them in the shop.

Q. You have them in the shop? A. Yes.

Q. And this is a carbon copy, is it not?

A. Yes.

Q. Is it a second carbon? A. Second, yes.

Q. Or first carbon?

A. First carbon; it is the number two copy.

Mr. M. O'Connell: I will object to the introduc-

(Testimony of John Flaget.)

tion of this, your honor, on the ground it is not the best evidence; it is secondary evidence, and further for the reason portions [125] of it are illegible and particularly the date; the date appears to me as being either the 8th or 9th.

The Court: It is a very serious question whether it should be permitted to go in evidence.

Mr. J. J. O'Connell: Your honor, there is an original in existence.

The Court: Well this carbon copy even though it is a carbon copy it is so faint it is almost indistinguishable, that date.

Q. (By Mr. J. J. O'Connell): Johnny, why don't you have the original; why don't you have it here rather than the carbon?

A. I wasn't asked to bring the original.

The Court: Where is the original?

A. It is in the shop.

The Court: Why didn't you bring it?

A. I didn't; I wasn't asked to bring it.

The Court: Why did you bring a faint carbon copy like that when you have the original in your office?

A. That is Mr. Guith's copy.

The Court: Oh, you got that from Mr. Guith?

A. That is what he got when he had the job done.

The Court: I will sustain the objection.

Q. (By Mr. J. J. O'Connell): Johnny, without referring to your records and so on [126] can you recall January 9th, 1954?

A. Parts of it, yes.

(Testimony of John Flaget.)

Q. And do you know of your own knowledge whether or not Chester Guith came to Northwestern Service business establishment which you operated on January 9th, 1954? A. Yes, I do.

Q. Can you recall what time of the day he came there? A. Shortly before noon.

Q. Shortly before noon?

A. I would say between eleven and twelve.

Q. Between eleven and twelve o'clock of that day? A. Yes.

Q. Is there anything that fixes the time in your mind?

A. Yes, I didn't have time to work on it, that is, complete it before dinner.

Q. Did he bring his car for repair?

A. Yes.

Q. And did you repair it on that day?

A. Yes, I did.

Q. Do you know or do you remember about what time he picked the car up?

A. I don't remember exactly what time, in the afternoon sometime.

Q. In the afternoon sometime? A. Yes.

Q. Do you remember whether it was in early afternoon or midafternoon or late afternoon?

A. That I couldn't say.

Q. You just couldn't say, would it be possible for you to obtain and get to us here a copy of the original of this order or this invoice?

A. I could, yes. I don't know how long it would take. My wife is in the shop and I don't know

(Testimony of John Flaget.)

whether she could find it herself or not.

Q. But you will try, you will make an attempt so we can have it for the benefit of the jury here and the court? A. Yes, I will.

Q. In connection with this case were you visited by any official of the Government, the plaintiff in the case?

A. Yes, I was, Mr. Fopp, I believe.

Q. Is that Mr. Gene Fopp? A. Yes.

Q. And did he represent himself to you to be an agent of the United States Government?

A. Yes, he did.

Q. Did he tell you the department to which he was attached?

A. That I wouldn't say.

Q. Did he ask you in connection with this case whether or not Mr. Guith had been to your place on January 9th, 1954? [128]

A. No, he didn't.

Q. What did he ask you about the case?

A. He inquired whether Mr. Guith's battery charger was in the shop for repair at somewheres in that neighborhood.

Q. And how long ago was it that Mr. Fopp came to you? A. Two or three weeks ago.

Q. Two or three weeks ago and it was the questions he ask you whether or not the Guith's battery charger was there? A. Yes.

Q. Did you give him the information that he wanted? A. Yes.

Mr. J. J. O'Connell: That is all.

(Testimony of John Flaget.)

Cross Examination

Q. (By Mr. M. O'Connell): Mr. Flaget, what information did you give Mr. Fopp?

A. That the battery charger came in approximately the 5th of January.

Q. The 5th of January? A. Yes.

Q. Was it there at the time?

A. At which time?

Q. At the time Mr. Fopp talked to you?

A. No. [129]

Q. How long did it stay in the shop?

A. From somewhere March, in the middle of March.

Q. You had it from January 5, 1954, until the middle of March 1954, is that right?

A. Yes.

Q. Can you recall who came into the shop the 7th of January 1954? A. Who came?

Q. As to who came in?

A. You recall everybody that came in?

Q. Well everybody other than ones who maybe drop in every day?

A. Well not necessarily without looking it up who came in.

Q. That would go for any other day too, would it not, in January of 1954?

A. Not necessarily.

Q. Will you explain that answer, not necessarily?

A. If there is something special a person could remember.

(Testimony of John Flaget.)

Q. You don't mean to tell me it is unusual to bring a car to a garage just before noon and you could not fix it before lunch, that happens quite often, doesn't it? A. Not too often, no.

Q. Do you do much work on cars?

A. Quite a little, more on tractors than I do on cars. [130]

Q. Did anybody bring anything to you on the 7th or 8th or 10th and you had to tell them that you couldn't get to it that day?

A. On the 7th I had just got some help; on the 7th is when I worked on the battery charger.

Q. Do you remember anybody that brought a car in that you could not work on on that particular day? A. On the 7th.

Q. Yes. A. No.

Q. On the 8th? A. No.

Q. Do you remember any cars you worked on on the 7th, 8th or 10th?

A. Yes, I can remember one I worked on.

Q. Which car was that?

A. '47 Chevrolet that belongs to Northwestern Service.

Q. Belonged to Northwestern Service?

A. Yes.

Q. What day did you work on that?

A. On the 7th I didn't myself, no, but the man that I had working there did.

Q. You remember that because you just hired a new man that day? A. Yes. [131]

Q. And was that the first car he worked on?

(Testimony of John Flaget.)

A. Yes.

Q. You watched him pretty close, is that right?

A. I was at the time.

Q. To see that he knew what he was doing?

A. Yes.

Q. And that is what makes that stand out in your memory? A. Yes.

Q. But you can't remember any other cars?

A. Not those two special days.

Q. Didn't you tell Mr. Fopp on this visit which you have referred, Mr. Fopp being the Special Agent for the Federal Bureau of Investigation, didn't you tell him that you kept no records?

A. No, I did not.

Q. Did you tell him you kept no records with reference to the battery charger?

A. I told him that anything less than an hour's work there wasn't usually a work order made on it.

Mr. M. O'Connell: Nothing further.

Redirect Examination

Q. (By Mr. J. J. O'Connell): Now, John, if somebody came in and asked you if, say, [132] Mr. Ralph Schell came into your plant on Friday, January 8th, picking out a specific person and so on, could you recall that tying it up with some matter?

A. If there was a matter to be tied up, I could recall it, yes.

Q. But you would have difficulty if somebody just asked you generally who came in on that particular day? A. Yes.

(Testimony of John Flaget.)

Q. But if they picked out a specific person your recollection and memory would have something to do because you had a person to tie it to, is that right? A. Yes.

Q. Did I ask you if you had personally seen Mr. Guith on that day? A. You did.

Q. And in the recollection that you testified?

A. Yes.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: Nothing further.

Mr. J. J. O'Connell: That is all.

Mr. J. J. O'Connell: The only thing, your honor, I want to make an effort to get the original of this invoice and with the permission of the court I would like to recall the witness.

The Court: Very well, if he gets it here in time you may use it. [133]

Mr. M. O'Connell: Your honor, may I request at this time that the carbon copy of the invoice be kept in the custody of the Clerk of the Court until the original is produced?

The Court: Yes, you may retain that carbon copy for comparison.

The Court: Call your next witness, Mr. O'Connell.

Mr. J. J. O'Connell: I just wanted to make a notation of it, your honor. I will call Clifford Guith.

ARTHUR CLIFFORD GUTH

was called as a witness for the defense and having been first duly sworn, testified as follows:

(Testimony of Arthur Clifford Guith.)

Direct Examination

Q. (By Mr. J. J. O'Connell): Will you state your name, please?

A. Arthur Clifford Guith.

Q. And where do you reside?

A. About 10 $\frac{3}{4}$ miles west of Cut Bank.

Q. And are you related in any way to the defendant here, Chester Guith? A. Yes, sir.

Q. And what is your relationship?

A. Brother. [134]

Q. You are his brother? A. Yes, sir.

Q. And you, of course, know—you live near his farm? A. Yes, sir.

Q. About how far removed?

A. $\frac{3}{4}$ ths of a mile.

Q. Now do you remember or can you recall the date of January 9th, 1954? A. Yes, sir.

Q. And how do you recall that date?

A. After this came up we started looking into what was done.

The Court: Can't you speak a little louder?

A. Yes, sir, I can.

The Court: Well speak up so the jury can hear you.

A. After this matter came up I started seeing what was done, what I could recall on that date.

Q. (By Mr. J. J. O'Connell): And what do you particularly recall about that date?

A. What I did, sir?

Q. Yes.

A. Well after breakfast I was running cattle

(Testimony of Arthur Clifford Guith.)

and I missed some cows and my cows were at my brother's place and I went to get them so I could get my cows and come home.

Q. Do you remember about—do you usually get up about the [135] same time each day?

A. Fairly close, yes, sir.

Q. And about what time is that?

A. Approximately eight o'clock.

Q. Around eight o'clock? A. Yes, sir.

Q. Can you recall about what time you went to your brother's place?

A. Yes, sir, I would judge about nine, nine thirty; it was in the morning.

Q. Between nine and nine thirty?

A. Yes, sir.

Q. About how long were you over there if you remember?

A. In the neighborhood of an hour, maybe a little over.

Q. About an hour? A. Yes, sir.

Q. I mean did you go over there to get cows or a specific cow?

A. Yes, sir, I went to get a cow.

Q. To get two cows or one?

A. There was a cow and a young heifer.

Q. And you were there about an hour, was your brother Chester Guith there then?

A. He was.

Q. Did you see and talk with him then? [136]

A. I did.

(Testimony of Arthur Clifford Guith.)

Q. Did he help you as far as the cows were concerned? A. He did.

Q. Now can you recall anything else that took place on that morning? A. Yes, sir.

Q. Well will you tell the jury what it was?

A. When I got my cows they are harder to run out away from a bunch, they are harder to cut out from a bunch and I had my brother help me, and when he helped me cut them out then he opened the gate for me so I could take them down the road, and as he opened the gate for me then he was ready to go to town.

Q. Did you see his wife, Lillian, and the children on that day? A. Yes, I did.

Q. Did you have an opportunity to see whether or not they got into the car? A. Yes, sir.

Q. Does your brother have more than one car?

A. No, sir.

Q. What kind of car does he have?

A. At that time it was a '49 Chevrolet, slate grey color, slate grey.

Q. And were you there long enough to observe whether [137] or not he got into the car, Chester Guith? A. Yes, sir.

Q. And were you there long enough to ascertain whether they drove away from the farm?

A. Yes, sir.

Q. And could you tell the jury about what time of the day that was?

A. Exact time, no, but estimated time I would say approximately ten ten thirty, somewheres in

(Testimony of Arthur Clifford Guith.)

that neighborhood. Now I never kept, there was no sense in keeping any exact time.

Q. Now did you see your brother any more that day? A. No, sir.

Q. Do you recall a basketball game that evening? A. I do.

Q. Did you see your brother at that basketball game? A. I never went.

Q. You never went? A. No, sir.

Mr. J. J. O'Connell: That is all.

Cross Examination

Q. (By Mr. M. O'Connell): Do you recall any other basketball game played by Cut Bank that year? [138] A. Yes, sir.

Q. What dates were they played on?

A. I don't know.

Q. You don't know the dates of any of them?

A. I am not a basketball fan; the reason I recall that date my brother asked me to go.

Q. Does he always ask you to go?

A. No, sir. Cut Bank and Shelby are rival teams and it is generally a good game and I don't care for basketball so I never went.

Q. When did you first hear about this charge against your brother?

A. On the date he was charged.

Q. What date was that? A. I don't recall.

Q. You don't recall that?

A. No, sir, the date the man came for my brother I was in the field combining.

(Testimony of Arthur Clifford Guith.)

Q. How many people helped you recall these dates? A. No one, sir.

Q. You just kind of, you said you just kind of recalled the events of the 9th; now can you sit there and recall what date you first heard this charge, the date he was charged you just said, what date was that? A. I never said. [139]

Q. What? A. I never said what date.

Q. I want to know what date it was; I would like to see you sit there and recollect it up like you recollected up these other things?

A. May I ask you one question.

Q. No, answer the question. Please answer my question.

A. I can't tell you the exact date.

Q. Can't you recollect it up?

A. No, sir, I can't.

Q. Well that is not nearly as long ago as January the 9th, 1954; in fact, it is about 9 months later; is it easier for you to recollect things that happen further back?

A. As far as I was concerned that date wasn't in question.

Q. How many times did you take off over to your brother's ranch to get cows in the last two years?

A. I wouldn't say how many times, possibly 15 times.

Q. 15 times; could you give us the times?

A. I could not.

Q. How come you could give us the date of the 9th of January?

(Testimony of Arthur Clifford Guith.)

A. Because we were talking about the basketball game between Cut Bank and Shelby.

Q. You talked about the game but you are not a fan? A. No, sir, I am not. [140]

Q. You are not interested?

A. Oh, yes, however I am not interested enough that I have gone.

Q. That you have what?

A. That I have gone to the games.

Q. You don't go see the games?

A. No, sir.

Q. By recalling the fact that there was a baseball game between Cut Bank and Shelby on that date can you recall the events of the date?

A. Yes, sir, it is the usual day, got up in the morning, fed my cows, missed a cow and heifer which went down to my brother's, got the cow and heifer and took them home and stayed home the rest of the day; it wasn't a good day; it wasn't a day to be out playing around; I am not that warm blooded.

Q. How about some of these other dates you went to get the cows, you can't remember any other date? A. Yes, sir.

Q. What are some of the dates?

A. July 4th.

Q. That would be fairly easy to remember?

A. Yes, it is.

Q. A little easier than January 9th I would say, wouldn't you? [141] A. I would.

Q. What conversations have you had with your

(Testimony of Arthur Clifford Guith.)

brother and your brother's attorney, Mr. O'Connell, regarding the events of January 9th?

A. I have spoke to the attorney very little.

Q. How many times?

A. I saw him this morning, I saw him last evening and that was I believe it. I walked from the hotel to the court room with him this morning; that was my contacts with the attorney.

Q. Did your brother ever tell you that he wanted you to recall events of January 9th?

A. Yes, sir.

Q. When did he first tell you that?

A. Sometime after he was charged, the fall of '54.

Q. And he helped you recall these events?

A. No, sir, he had no way of helping me except together we recollected, he and I thought of the basketball game; we recalled that because we had a slight wager on it and I lost.

Q. Still you don't remember what date he was charged? A. No, sir, I don't.

Mr. M. McConnell: That is all I have. [142]

Redirect Examination

Q. (By Mr. J. J. O'Connell): Do you remember how much you bet on the game?

A. 25c; that is our usual betting.

Q. And you can recall that because you tied it up with the game? A. Absolutely.

Q. Now if somebody were to ask you to recall the events of October the 12th, 1954, a visit of Mr.

(Testimony of Arthur Clifford Guith.)

Fopp, the day could you tie up the events of the date of October 12th, 1954?

A. What I did through the day?

Q. Yes.

A. Absolutely if that was the day he was there.

Q. Well I mean just for the benefit of the jury and for counsel tell us what you did on October 12th, 1954?

A. My brother and I both own a combine and we combined together and we were combining grain on that date; we were picking up swaths with our combine and a friend of mine came out where we were working, Harry Rakman, he worked with us the year before and he came out to see what we were doing and we picked up these swaths and it was the end of the swaths and we took the combines home, then we took the pickups off and put the other reels on, then we went and cut some standing grain. [143]

Q. Now how do you recall those events on October 12, 1954.

A. Because I can show you very close to the exact spot where we were parked when Mr. Fopp came, or whatever his name is.

Q. You connect it up with some specific event like you do on January the 9th?

A. Yes, sir.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: No cross examination.

Mr. J. J. O'Connell: Call Jimmy Romsa.

JIMMY ROMSA

was called as a witness for defense and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. J. J. O'Connell): Will you state your name, please? A. Jimmy Romsa.

Q. Now will you speak loudly enough, Jimmy, so that the jury will hear you and the court and counsel back here? Where do you reside?

A. About 6 miles west of Cut Bank.

Q. About 6 miles west of Cut Bank? [144]

A. Yes.

Q. Are you acquainted with the location of the Gobert farm? A. Yes, I am.

Q. Do you know where it is? A. Yes.

Q. Have you been on that farm?

A. I don't know if I have ever been on it but I go past it every other day.

Q. You go past it every other day?

A. Yes.

Q. Do you know the location of the Guith farm?

A. Yes.

Q. Now how long have you resided in that area?

A. About 12 or 13 years.

Q. Do you know Eleanora Gobert?

A. Yes.

Q. How long have you known her?

A. 4 or 5 years anyway.

Q. Have you had occasion to see her on any times.

A. I have seen her merely by accident but I don't think I have talked to her.

(Testimony of Jimmy Romsa.)

Q. You have never talked to her? A. No.

Q. Have you seen her in the company of any other boys? [145] A. Yes.

Q. And can you recall any occasion, any number of occasions?

A. I can name three times that I saw her, twice with boys and once without.

Q. Twice with boys and once without?

A. Yes.

Q. Do you recall about when those occasions were?

A. One of them was before the 9th and the other was after and the other I don't recall whether it was before or after.

Q. Was she alone with these boys?

A. Once she could have one sister with her.

Q. Once there could have been a sister with her, what about the other time?

A. The other time I don't think so.

Q. She was just with the boys herself?

Mr. M. O'Connell: Objected to unless this is nailed down a little better as to time and place, the times she was with the boys.

The Court: Yes, perhaps you should limit it to time and place of the occasions so there will be some way of looking into it on the part of the other counsel.

Mr. J. J. O'Connell: Your Honor, on direct examination yesterday both Mr. Gobert and Mrs. Gobert testified [146] she had never been out with boys on any occasion.

(Testimony of Jimmy Romsa.)

The Court: Yes, I think that was the testimony all right. Well, you can bring that up on cross examination.

Q. (By Mr. J. J. O'Connell): Can you for the benefit of the jury and court and counsel can you tie those occasions down to any particular day?

A. Not exactly the date but I can say whether it was before or after the 9th.

Mr. M. O'Connell: Just a moment. I will ask the witness to explain before or after what—the 9th of January?

Q. The 9th of January, 1954? A. Yes.

Q. When about did you see her before January the 9th, 1954? Just approximately if you can't, you know, if you can't give us——

A. It was in the month of December.

Q. In the month of December, 1953?

A. Yes.

Q. Then did you see her after January 9th, 1954? A. Yes.

Q. Do you know about approximately when?

A. Around the end of January or beginning of February.

Q. The end of January, 1954, or beginning of February, 1954? [147] A. Yes.

Q. Now you said there was an occasion in town when you saw her with her sister? A. Yes.

Q. Before we go over to that, on these two occasions you speak about were her mother and father with her? A. No.

Q. Was either her mother or father with her?

(Testimony of Jimmy Romsa.)

A. No.

Mr. M. O'Connell: Your honor, in view of the last two answers I am going to object to any further testimony along this line because it cannot serve to advise the court or jury in a case of this type as being incompetent, irrelevant and immaterial to attack the virtue or morality of the prosecutrix, and the fact now that in view of the Gobert's testimony that she had not gone out with boys as this was outside their province and they could be testifying to matters certainly only within their own knowledge and there is no showing here that Goberts had any knowledge that she was out with these boys. The question serves only for the purpose of impeachment and there is no foundation laid for impeachment, your honor.

The Court: Well we will let it stand as it is. It is a case for you to argue to the jury as to whether it has any value at all or not and if you can make any value out of it [148] or whether the Government can and I will let it stand as it is for what it is worth in view of the testimony given by the father of the prosecutrix yesterday.

Q. (By Mr. J. J. O'Connell): Now you told of an occasion——

The Court: Proceed with some other subject. If you have anything further, you can proceed.

Q. (By Mr. J. J. O'Connell): You told of an occasion you saw Eleanora Gobert and her sister in Cut Bank?

A. Yes.

Q. Do you know about when that was?

(Testimony of Jimmy Romsa.)

A. No, I can't say. I seen her and her sister walking down the street.

Q. Were they alone?

A. Yes, just the two of them.

Q. Do you know which sister it was?

A. Yes, the one older than her.

Q. The one just older than her?

A. Yes, she is one or two years older.

Q. And were they accompanied by the mother and father? A. No.

Mr. J. J. O'Connell: That is all, your honor.

Mr. M. O'Connell: No cross examination.

The Court: The court will take a recess until 1:30 p.m. (12 noon, June 10, 1955.) [149]

Court resumed, pursuant to recess, at 1:30 p.m. on June 10, 1955, at which time the jury, defendant and counsel for both parties were all present.

The Court: You may proceed.

Mr. J. J. O'Connell: Call Chester Guith.

CHESTER GUTH

defendant, was called as a witness, and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. J. J. O'Connell): Chester, will you speak up loudly enough so that the jury will be sure to hear you and the court and counsel at the table. Will you state your name, please?

A. Chester Guith.

Q. Where do you reside?

(Testimony of Chester Guith.)

A. About eight miles west of Cut Bank.

Q. And you are the defendant in the action of United States of America, Plaintiff, vs. Chester Guith, defendant?

A. That is right.

Q. How old are you Chester? A. 42.

Q. And you are married? A. I am.

Q. And how long have you been married? [150]

A. 13 years.

Q. You have been present of course all during the trial and have heard all of the testimony that has been adduced here?

A. That is right.

Q. Now calling your attention to the date January 9th, 1954, which is the date on which you allegedly committed the offense with which you are charged, can you recall the date of January 9th, 1954?

A. Yes.

Q. And why and in what manner do you recall it?

A. Well I have recalled it very strongly because I was charged with that crime and different things that occurred during that day.

Q. Did you discuss that date with your wife?

A. I did.

Q. Did you hear her testimony adduced here today?

A. I did.

Q. And would you testify substantially as to your actions on that day as she testified about them? Would you testify substantially the same about your actions on that day as Mrs. Guith testified about them, do you remember what time you arose on that day?

A. Approximately eight o'clock.

(Testimony of Chester Guith.)

Q. And after arising you naturally had breakfast? [151]

A. That is right.

Q. And what did you do after that?

A. I milked three cows and went out and fed 46 head of cattle.

Q. And will you describe just quickly and briefly the length of time it took you to feed those, that is to milk the cows and feed the cattle?

A. From an hour to an hour and a half, something like that, sometimes it took more.

Q. Why did it take an hour to an hour and a half?

A. Well in feeding the 46 head of cattle I was feeding baled hay and I had to drag the bales out of the corral and scatter it for the cows.

Q. What time do you think you finished or completed that job, what time that morning?

A. I would say between ten and ten thirty, something like that.

Q. Sometime between ten and ten thirty, was that something that you did usually every day?

A. That was an every day occurrence.

Q. So it is not difficult for you to recall that particular part of the day or your activity at that time?

A. No.

Q. Now after ten thirty what did you do?

A. My brother come down and he was there before I [152] finished the chores, and we visited and then he got a cow and heifer which got into my cattle.

(Testimony of Chester Guith.)

Q. And then you helped him get that out, is that it? A. Yes.

Q. And then what did you do, get ready?

A. Well I was practically ready, all I did was put my coat jacket on and got ready for town.

Q. Ready to go to town? A. Yes.

Q. And by town you mean Cut Bank, is that true? A. Yes.

Q. Ordinarily how long does it take you to drive from your place to Cut Bank—let me ask you do you remember the kind of day it was?

A. Well it wasn't a warm day; it was a chilly day, I will put it that way.

Q. Was there any snow on the ground?

A. Yes.

Q. Do you have any idea about how much?

A. Offhand I would say approximately 6 inches, something like that.

Q. And you and your wife and the children got into the car, is that correct? A. Yes.

Q. Have you any idea about what time that might have been? [153]

A. Oh, a little after about eleven o'clock I would say; now, I didn't look at the time about that.

Q. And then you proceeded on into Cut Bank?

A. That is right.

Q. And when you got in there where did you go? A. To the Postoffice.

Q. And about how long were you in the Post-office?

A. I wasn't in the Postoffice.

(Testimony of Chester Guith.)

Q. What did you do when you went into the Postoffice?

A. I drove up to the curb and my wife and the children got out of the car and went into the Postoffice.

Q. And where did you go?

A. Down to Northwestern Service.

Q. The Northwestern Service? A. Yes.

Q. That is the establishment operated by Mr. Flaget who testified here previously?

A. That is right.

Q. About what time did you get down there?

A. Just before noon.

Q. Just before noontime? A. Yes.

Q. And what did you do down there?

A. I left the car outside and I went into the building and asked Johnny if he could work on the car. [154]

Q. What was wrong with your car?

A. Brakes.

Q. The brakes, you were having difficulty with the brakes?

A. Yes, they weren't working properly.

Q. I mean had that difficulty continued for some time?

A. Well, it was coming on gradually, yes.

Q. The brake fluid or was it wearing out?

A. Whatever was the matter there.

Q. About how long did you stay at the Northwestern Service?

A. Not very long. I just asked him if he could

(Testimony of Chester Guith.)

work on the car and then I left. I was there probably, oh, right offhand maybe five minutes approximately.

Q. Then from the Northwestern Service where did you go? A. To the Wagon Wheel Cafe.

Q. Do you know about what time you arrived there? A. About noon.

Q. Around noontime? A. Yes.

Q. Do you remember? I presume you said.

A. Yes.

Q. You were there with your wife and the children? A. That is right. [155]

Q. And do you know about how much time that consumed? A. About an hour I imagine.

Q. So it was about one o'clock when you left the Wagon Wheel Cafe? A. Yes.

Q. And then from there where did you go?

A. Well we left the Wagon Wheel and walked up the street and just kind of window shopping and then we went into the Public Drug.

Q. Were you in the Public Drug any time, any amount of time?

A. Well not too long. We were there a while looking around and my wife bought some things.

Q. And then did you make any purchases in the Public Drug that you can recall? A. Myself?

Q. Yes. A. Not that I recall, no.

Q. Recall any your wife made?

A. She came out with a sack, so I presume she purchased something, I don't know what.

(Testimony of Chester Guith.)

Q. Did you talk with anybody in the Public Drug?

A. Yes, I know all the majority of the people that work there and I generally visit with them in there.

Q. And from the Public Drug where did you go? [156]

A. Down to the Safeway.

Q. And did you and your wife make purchases there?

A. That is right.

Q. What?

A. Yes.

Q. Will you take your hand down?

A. Pardon me.

Q. Do you know about how long you were in the Safeway Store?

A. About an hour, a little over, something like that; I never kept track of it.

Q. And then from the Safeway Store where did you go?

A. Well we went back down town.

Q. Did you pickup your car that you left at the Northwestern Service?

A. Yes, shortly after that I picked up my car.

Q. Did you go and personally pick it up yourself?

A. I did.

Q. Have you any idea about what time of the day it was then?

A. I would say around four, something like that.

Q. Around four o'clock?

A. Yes.

Q. Then after you got in the car what did you do?

A. I went back and picked up my wife and the groceries. [157]

(Testimony of Chester Guith.)

Q. And from there where did you proceed?

A. Delivering eggs.

Q. And then after the delivery of the eggs you went on home to your farm, is that correct?

A. That is right.

Q. Do you know about what time you got there?

A. About five, I would say something like that, or quarter to.

Q. Did you have some chores to do after that?

A. Yes.

Q. And that took some time I presume?

A. Yes, I had the cows to milk and the cattle to feed.

Q. Did you have supper then?

A. Yes, before I did the chores.

Q. Oh, before you did the chores?

A. Yes.

Q. Then what did you do the rest of the evening, just as briefly as you can?

A. LeRoy and I got ready to go to town to the basketball game.

Q. Do you know what basketball game it was?

A. Cut Bank and Shelby.

Q. Is that the kind of a game or a game that would stand out in your mind?

A. Well they are the two outstanding teams or presumed [158] to be and it was a question who was going to win.

Q. Did you have any discussion that day when you saw Mr. Flaget in the Northwestern Service concerning the game?

A. Yes.

(Testimony of Chester Guith.)

Q. Do you remember what that was about?

A. I just asked him how he thought it was, who was going to win and he says Cut Bank and I bet him 50 cents they wouldn't.

Q. You bet him 50c Cut Bank wouldn't win the game; was there quite a bit of discussion about the game? A. Yes.

Q. Now then after the game where did you go?

A. Home.

Q. Do you know about what time you got home?

A. No, it would be a little after eleven I presume. I didn't pay any attention but as a rule the games let out at eleven, something like that.

Q. I want to ask you, you of course live on a farm, is that correct? A. Yes.

Q. Do you own that farm? A. I do.

Q. Does the United States own any part of it or have any reservation in it? A. Not any.

Q. It is land deeded definitely to you?

A. It is.

Q. And do you know how you acquired that land, that farm?

A. I bought the tax deed.

Q. From who? A. Glacier County.

Q. Now let me ask you on January 9th, 1954,—let me ask you first do you know Eleanora Gobert?

A. I do.

Q. How long have you known her?

A. I can't answer the exact year but she wasn't very big when I first knew her.

Q. Now I want to ask you on January the 9th,

(Testimony of Chester Guith.)

1954, did you see Eleanora Gobert? A. No.

Q. Did you see her at any time during that day?

A. No.

Q. Now you were present yesterday when she testified? A. I was.

Q. Were you in the tool shed at your farm about twelve o'clock noon on January 9th, 1954?

A. No.

Q. You were where you have said you were and where you have testified previously? [160]

A. At the Wagon Wheel around twelve o'clock or a little after.

Q. Now she said that she talked to you in the tool shed at that time about the battery charger, do you remember whether she talked to you at that time about the battery charger? A. Why no.

Q. She said you asked her how school was, is that true or false? A. That is very false.

Q. Now she says that as she started to go out the door that you pulled her back, is that true or false? A. Very false.

Q. She further testifies that you started trying to pull her clothes off as she tried to get away and you wouldn't let her go, is that testimony true or false? A. Very false.

Q. Now she says you threw her on the ground and threw her down by the shelf on the ground?

A. That is false.

Q. Then she says that you started unbuttoning your overalls down the front?

A. That is false.

(Testimony of Chester Guith.)

Q. Then testifies that as I have it here that panties and brassiere were the only things she had on? A. That was false; she wasn't there.

Q. She wasn't there. Now she says that she had sexual intercourse, that you had sexual intercourse with her at that time, did you or did you not?

A. I did not.

Q. You were present while she testified about all the matters and I want to ask you whether or not you did any of the things on January 9th, 1954, that she accused you of on that stand yesterday?

Mr. M. O'Connell: Objected to, your honor, as too indefinite and uncertain, too broad a question. I think counsel could ask as to the different statements made by the prosecutrix on the stand, and that question he is asking now is too broad in scope, too sweeping.

The Court: The defendant heard her testimony yesterday and as to those material matters he may say whether they are true or false; he may testify. I don't think there is any great breadth to that. I will overrule the objection; he may answer the question.

Mr. J. J. O'Connell: Read the question.

(Question read.)

A. Absolutely not.

Q. (By Mr. J. J. O'Connell): Now she went on further and said that after this alleged occurrence on January 9th, 1954, that on three or four other occasions within a period of three or four [162] weeks after the occurrence on January 9th, 1954,

(Testimony of Chester Guith.)

that you again had sexual intercourse with her, is that testimony true or false? A. Very false.

Q. Did you have sexual intercourse with her on those three or four occasions? A. No.

Q. Now she stated that she was the mother of a baby and accused you of being the father, that she considered that you were the father of that baby, what do you have to say about that?

A. I am not.

Q. I want to ask you if you are willing to undergo a blood test, waive any of your constitutional rights in that connection in order to determine whether or not you are the father of the baby?

A. I will.

Q. Now you were present when her father, Edward M. Gobert No. 2, I think he described himself, when he testified? A. Yes.

Q. Now he says that he testified that he talked with you on October 12, 1954, is that correct?

A. Yes.

Q. He said that you came to his home or to the jail, I think it was late on that day and that you had a conversation [163] with him?

A. I did.

Q. Now he also testified that you came there crying, bawling like a baby, is that right?

A. That is incorrect.

Q. During the course of that conversation did you cry? A. I did.

Q. And why did you cry?

A. Because it hurt my feelings to think that

(Testimony of Chester Guith.)

he was accusing me of something I didn't do of that type.

Q. Now he also testified you apologized to him for what you had done to his daughter?

A. I did not.

Q. He said you said you were a s.o.b. because you had ruined her, did you make any such statement? A. No, I didn't.

Q. Did you ask him to refrain from telling your wife? A. No.

Q. So she wouldn't get wind of it?

A. No.

Q. Is that the same day that Mr. Gene Fopp, Special Agent for the F.B.I., talked with you?

A. That is.

Q. And did you tell your wife about that on that day?

A. I told her I believe it was the next day. [164]

Q. Told her what the situation was?

A. What I was accused of.

Q. Now Mr. Gobert testified that he saw you again on the following day on October 13th by his house; there were just you and he present?

A. That is right.

Q. And he said that you asked him to have the baby taken away to a Helena orphanage, is that true or false?

A. Would you repeat that question again?

Q. The material part of it that I am now asking you about is on October 13th by the house——

A. Yes.

(Testimony of Chester Guith.)

Q. And when only you and he were present and he said that you asked him to take the baby to a Helena orphanage? A. I did not.

Q. And was there any discussion about taking the baby to a Helena orphanage? A. No.

Q. Now on that occasion on October 13th was there any discussion about money?

A. Not that day.

Q. When was there a discussion about money?

A. It was the next day.

Q. On October the 14th?

A. That is right. [165]

Q. And did you see Mr. Gobert then again?

A. I did.

Q. And was that by his home again?

A. Yes.

Q. When only you and he were present?

A. That is right.

Q. Is that the occasion then that there was a discussion about money? A. That is right.

Q. And what was that discussion about money?

A. He said he thought he ought to have some money.

Q. Was that from you?

A. Well he was talking to me.

Q. Did he ask you for any specific amount of money?

A. No, because I told him I am the goat for somebody and I am not paying you anything.

Q. And on these occasions did you deny to Mr.

(Testimony of Chester Guith.)

Gobert that you had had sexual intercourse with his daughter?

A. I told him I was being made the goat for somebody.

Q. And did you or did you not deny it?

A. Well I denied it.

Q. Now on that occasion there was also some discussion about him getting in the truck with you to go around and tell the neighbors that this gossip wasn't true, was there such a discussion as that?

A. On the 13th?

Q. That was on the 13th?

A. That was on the 13th.

Q. Tell the jury what the nature of that discussion was?

A. I told him I was being made the goat for something I didn't do and I said, the scandal is hurting your daughter as much as it is hurting me and why not get in the car and go around to others we know have heard it and we will tell them it is not so but is a lie, and he said he would and on, I was to pick him up the next morning. I went down there the next morning and he said he couldn't go because Mrs. Anderson had come and asked him to take a daughter and her to Browning because their baby was sick, and he says, "I can't turn her down," and I said, "that is fair enough I will get you this evening." And on the evening I went down there and there was a car drove in just ahead of me and he come out and said, "I have company I can't go." And on the 14th, I said, "I

(Testimony of Chester Guith.)

will see you in the morning." And on the 14th I went down there in the morning and he asked me for money and I refused him and he refused to go with me from then on.

Q. Was the purpose to go around and tell the neighbors that it was a lie that you had had anything to do with his daughter?

A. That that statement was a lie. [167]

Q. Now was there any additional approach made to you with reference to money in connection with this case? A. Yes, sir.

Q. And by whom was that approach made?

A. Mr. Aronow from Shelby.

Q. Mr. Aronow from Shelby, do you know whether or not he is an attorney in Shelby?

A. He is.

Q. Showing you what has been marked for identification by the clerk as Defendant's Exhibit No. 4, consisting of a letter with an envelope attached, I will ask you if you know what that exhibit is? A. That is right, I do know.

Q. Do you know what it is? A. Yes.

Q. Will you tell the jury what it is?

A. I got that letter from Mr. Aronow an attorney from Shelby and I went down there.

Q. Now just a minute, did this letter come to you in the regular course of the mail?

A. Yes.

Q. Did you pick it up at your box over in the post office or where? A. In the post office.

(Testimony of Chester Guith.)

Q. And do you remember about approximately when you [168] picked it up?

A. I can't tell you right offhand.

Q. You could tell by reference to the letter?

A. Yes.

Q. And it came addressed to you?

A. Yes.

Q. You received it? A. Yes.

Mr. J. J. O'Connell: We offer it in evidence, your honor.

Mr. M. O'Connell: May I see it?

The Court: Yes.

Mr. M. O'Connell: I will object to the admission of this proposed exhibit, your honor, on the grounds no proper foundation has been laid; it is incompetent, irrelevant and immaterial; if it were admitted it could open the door to considerable hearsay testimony and it is not the best evidence.

The Court: Let me see it.

The Court: Sustain the objection.

Mr. J. J. O'Connell: Now may I ask some additional questions, your honor?

The Court: Not about that; I ruled that out.

Mr. J. J. O'Connell: To lay some additional foundation. [169]

The Court: Well you may attempt to.

Q. (By Mr. J. J. O'Connell): After you received this letter did you go see Mr. Aronow?

A. I did.

Q. And did you talk with him?

(Testimony of Chester Guith.)

A. Personally, yes.

Mr. M. O'Connell: Objected to, your honor; he is covering, he is getting into a conversation with Mr. Aronow which is incompetent, irrelevant and immaterial and there is no proper foundation at this time.

The Court: Sustain the objection.

Q. (By Mr. J. J. O'Connell): Without reference to this letter did Mr. Aronow ask you for any money for the Goberts?

Mr. M. O'Connell: Objected to, your honor; that is hearsay.

The Court: Yes, sustain the objection.

Mr. M. O'Connell: Your honor, I object to this whole line of testimony because apparently we will have no opportunity to examine on cross examination this witness to whom they are referring.

The Court: Yes, sustain your objection; it is ruled out.

Q. (By Mr. J. J. O'Connell): Now did you tell Mr. Aronow that you would not give [170] him any money for the Goberts? A. Yes.

Mr. M. O'Connell: Objection, your honor.

The Court: Sustain the objection.

Q. (By Mr. J. J. O'Connell): When you and Mr. Aronow met was there any discussion about the amount of property that you had? A. Yes.

Mr. M. O'Connell: Objected to.

The Court: I will sustain the objection to all this line of testimony.

Mr. J. J. O'Connell: Your honor, we have

(Testimony of Chester Guith.)

great difficulty in connection, I mean as an attorney Mr. Aronow of course can't actually testify about his professional relationship with the Goberts.

The Court: It is apparently not an issue in this case at all.

Mr. J. J. O'Connell: Well, your honor——

The Court: I have ruled; that settles it; turn to something else.

Mr. J. J. O'Connell: Just one more question.

Q. (By Mr. J. J. O'Connell): You heard Mr. Gobert's testimony yesterday that there was no discussion of money with you on October 13th or 14th, was that testimony correct? [171]

A. Would you repeat that again, please?

Q. You heard Mr. Gobert's testimony that there was no discussion with you of money on either the 13th or 14th when you discussed money with him; I mean is his statement correct that there was no discussion of money?

Mr. M. O'Connell: I object to the question, your honor, as being incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues of this case; it has nothing to do with the crime with which the defendant is charged or with the circumstances surrounding the crime.

The Court: Well the witness yesterday testified in regard to that matter and he said as I recall that there wasn't any discussion of money at all; now this witness may testify as to whether that occurred or it didn't occur or whether there

(Testimony of Chester Guith.)

was a discussion as to money or money settlement or anything of that sort; he may contradict if that is what he intends to do. Answer the question.

Mr. J. J. O'Connell: Read the question.

(Question read.)

A. It is not correct.

Mr. J. J. O'Connell: That is all. [172]

Cross Examination

Q. (By Mr. M. O'Connell): Mr. Guith, do you feed your cattle every day? A. Yes.

Q. About what time do you feed them?

A. Well it is after breakfast.

Q. And where is the feeding place with reference to your house?

A. Right back of the barn.

Q. Right close to your house?

A. Would you ask that question again, please?

Mr. M. O'Connell: Read the question.

(Question read.)

A. It is right out north of the house.

Q. How far?

A. Oh, anywhere from 150 feet to 300 feet.

Q. What do you feed your cattle?

A. Hay.

Q. Where did you get the hay?

A. Put it up, raise it.

Q. Where do you keep it on the ranch?

A. Behind the barn.

Q. And how far is the barn from the place where you feed them? [173]

(Testimony of Chester Guith.)

A. Well I drag it around to the south side of the barn; the hay corral is attached to the north side or west side of the sheds.

Q. How far is the place to get the hay from the place you put it for the cattle to eat it?

A. That varies.

Q. About how far?

A. Oh, about sometimes 300 feet. Sometimes farther, it all depends on whether the ground where I feed is dirty, I feed on cleaner ground, so it varies.

Q. And how long does this feeding operation take?

A. About an hour.

Q. And the feeding operation consists entirely of moving hay, does it not, from the stack of hay near the barn to the cattle?

A. Yes.

Q. And about what time of the day do you usually feed your cattle?

A. That all depends on what time I get up or have breakfast.

Q. Do you go to town every time your wife does?

A. No.

Q. She quite often drives into town with the children without you, does she?

A. At times. [174]

Q. And when there is snow, more than a foot of snow on the ground it would be quite easy for her to drive into town?

A. No, it isn't.

Q. For what reason?

A. The roads are slick and she won't drive.

Q. If it is thawing?

(Testimony of Chester Guith.)

A. If there is a foot of snow on the ground and it was thawing it would be slick.

Q. Do you recall whether or not the sun was shining on the 9th?

A. I can't recall that, no.

Q. You recall everything else, do you recall whether the snow was shining?

A. If you will remind me of something outstanding, pertaining to the sun, I can probably tell you.

Q. You very often charge batteries for Mr. Go-
bert? A. No.

Q. Did you ever charge a battery for him?

A. I have.

Q. How many times?

A. I couldn't tell you right offhand, once or twice.

Q. When?

A. I believe once was in the fall and another time was in, oh, I couldn't say when it was, after I got the [175] battery charger.

Q. The fall of what year? A. 1953.

Q. Do you remember whether or not there was any ice on the roads on January 9th, 1954?

A. Spots.

Q. So as to make the road slippery?

A. Yes.

Q. Do you recall whether or not it was freezing?

A. It was a very kind of raw day; just right offhand I would say it was freezing.

(Testimony of Chester Guith.)

Q. How long had the snow been on the ground, do you remember? A. I couldn't.

Q. Do they plow that road you live on?

A. When it gets drifted they do.

Q. Was it drifted at the time?

A. Not deep drifts where we couldn't get through.

Q. How long had it been since you had had a snow, do you remember?

A. Since we had a snow?

Q. Yes.

A. Well there was snow on the ground then.

Q. I mean since you had had a snow, since it had snowed?

A. I can't tell you; I can't recall. [176]

Q. You don't remember. A. No.

Q. You said you didn't have any sexual intercourse with Eleanor Gobert on the 9th or two weeks after that or three weeks after that, is that right? A. That is correct.

Q. Did you ever have sexual intercourse with her?

Mr. J. J. O'Connell: Now, your honor, I want to object; this is irrelevant, immaterial and incompetent.

The Court: Yes, I will sustain the objection.

Q. (By Mr. J. J. O'Connell): I will ask you, Mr. Guith, whether or not on the 12th day of October, 1954, you told F.B.I. Agent Gene Fopp that you had sexual intercourse?

A. I didn't.

(Testimony of Chester Guith.)

Q. With Eleanora Gobert? A. I did not.

Q. I ask you now if you deny that you told Special Agent Gene Fopp on October 12th, 1954, that you had sexual intercourse with Eleanora Gobert several times? A. I never told him that.

Q. You are denying it?

A. I am denying it.

Q. Have you ever made any request to have a blood test taken to establish—— [177]

A. Not to my knowledge.

Q. Not to your knowledge?

A. Not to my knowledge.

Q. You would know it if you made a request?

A. If I made the request, I would tell it.

Q. You live only a quarter of a mile from the Gobert ranch, is that right? A. That is right.

Q. And since you found out about this charge I believe it was in October, 1954, is that right?

A. That is right.

Q. You mean you have made no request to submit to a blood test to disprove paternity?

A. I have not.

Q. And has the first offer you have heard to submit to such a blood test been made in this courtroom during the course of this trial?

A. Would you repeat that?

Q. Is the first offer you have ever made to submit to such a blood test been made in this courtroom during the course of this trial?

A. That I have offered?

(Testimony of Chester Guith.)

Q. Is that the first time you have offered to submit to a blood test? A. No. [178]

Q. When did you first offer?

A. Mr. Fopp asked me one time if I would be afraid to take a blood test and I said absolutely not.

Q. When was this?

A. On one of the occasions that he contacted me.

Mr. M. O'Connell: No further cross examination.

Redirect Examination

Q. (By Mr. J. J. O'Connell): Now with reference to a blood test did you go see any doctor or doctors in connection with it? A. No.

Q. Did you discuss taking a blood test with Dr. Whetstone?

Mr. M. O'Connell: Objected to as being hearsay.

The Court: Sustain the objection.

Q. (By Mr. J. J. O'Connell): You did tell Mr. Fopp you were not afraid to take a blood test?

A. I told him I wasn't afraid.

Q. Do you remember whether that was on October 12th, 1954, or whether it was on one of the more recent occasions when Mr. Fopp has talked to you?

A. One of the more recent.

Q. When was that, 3 or 4 weeks ago? [179]

A. No, it was before that.

Q. And we make your position now as you previously stated on the stand you are willing to take such a blood test and waive any constitutional right you have in that behalf? A. Absolutely, yes.

(Testimony of Chester Guith.)

Q. Have you been advised how a blood test to establish paternity operates?

A. No, I wouldn't have understood it anyway if I had.

Q. You wouldn't what?

A. I wouldn't have understood it if I had of been.

Q. Have you been advised whether it is conclusive or not in establishing paternity? A. No.

Q. Have you been advised that a blood test might be beneficial inasmuch as it cannot establish the fact that you might be the father of a certain child?

A. Yes, I have been told that.

Q. (By Mr. M. O'Connell): Who told you that?

A. Pardon me.

Q. Who told you that a blood test could not be conclusive in the determination of paternity?

A. Now would you please explain that more thoroughly?

Q. Well Mr. O'Connell just asked you if you had not [180] been advised that a blood test was not conclusive as to determination of paternity and you said you had been advised it was not?

Mr. J. J. O'Connell: I object to the question; that is not a restatement of the question I asked him.

The Court: If it is not a restatement of the question, I will sustain the objection to it.

Mr. J. J. O'Connell: Read the question and answer.

(Testimony of Chester Guith.)

Q. Have you been advised that a blood test might be beneficial inasmuch as it cannot establish the fact that you might be the father of a certain child?

A. Yes, I have been told that.

Q. (By Mr. J. J. O'Connell): Who told you that? A. Dr. Whetstone.

Q. Dr. Whetstone? A. Yes, sir.

Q. Did you go to him with the idea of having a blood test taken? A. Pardon me.

Q. Did you go to him with the idea of having a blood test made? A. No, not right then.

Q. Well I mean why did you go to him about it?

A. To get advice.

Q. Did he tell you that a blood test from the point of view of determining you were not the father of a certain child couldn't be conclusive?

Mr. M. O'Connell: I object to that as leading, hearsay, and leading and suggestive.

The Court: Yes, that is going beyond the scope of that question, and then becomes hearsay.

Mr. J. J. O'Connell: That is all.

Mr. J. J. O'Connell: Call Mr. Armstrong.

A. E. ARMSTRONG

was called as a witness for defense and having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. J. J. O'Connell): Mr. Armstrong, will you state your name, please?

(Testimony of A. E. Armstrong.)

A. A. E. Armstrong.

Q. And where do you reside?

A. Cut Bank, Montana.

Q. And how long have you resided there?

A. 22 years.

Q. Have you held any official positions with Glacier County, Montana? A. Yes, sir. [182]

Q. What were those positions?

A. I was County Treasurer four years, County Sheriff twelve years, and I am now the Clerk of the Court.

Q. The Clerk of the District Court?

A. Yes, sir.

Q. And when were you elected Clerk of the District Court? A. 1952.

Q. And you are still serving your four year term? A. Yes, sir.

Q. Now have you had an opportunity to know what the—do you know Chester Guith?

A. Yes, sir.

Q. How long have you known him?

A. Ever since I have been in Cut Bank.

Q. And have you had an opportunity to know what his reputation in the community is for truth and veracity?

A. Yes, I have my own opinion about that.

Q. I mean have you discussed with others in the community and heard from others in the community what his reputation is? A. Yes, I have.

Q. And what would you say that reputation is for truth and veracity?

(Testimony of A. E. Armstrong.)

A. I have never heard anything against the boy myself.

Q. Is it a good reputation? [183]

A. It is above reproach; I would say its never been anything else to me except that.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: No cross examination.

Mr. J. J. O'Connell: Call Mr. Ingram.

FRED H. INGRAM

was called as a witness for defense and having been first duly sworn testified as follows:

Direct Examination

Q. (By Mr. J. J. O'Connell): Will you state your name, please?

A. Fred H. Ingram.

Q. Where do you reside?

A. Cut Bank.

Q. How long have you resided there?

A. Since '26.

Q. And have you held any official positions in Glacier County? A. Yes, sir.

Q. What were they?

A. Constables and Deputy Sheriffs.

Q. And for how long a period?

A. I am still Constable.

Q. And how long were you a Deputy Sheriff?

A. '45 to '51. [184]

Q. Do you know Chester Guith, the defendant here? A. I do.

(Testimony of Fred H. Ingram.)

Q. How long have you known him?

A. Since '34.

Q. And do you know what his reputation in the community is for truth and veracity?

A. I have never heard nothing against the man until I come here.

Q. Would you say whether that reputation is good or bad?

A. Well what I have always heard until I hear about this I didn't pay much attention until I was coming up here.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: No cross examination.

Mr. J. J. O'Connell: We rest, your honor.

The Court: We will take a recess for 15 minutes.

(2:25 p.m.)

Court resumed, pursuant to recess, at 2:45 p.m., at which time the jury, defendant and counsel for both parties were present.

The Court: Proceed.

Mr. M. O'Connell: Your honor, in rebuttal I would like to call Mr. Fopp.

The Court: Very well. [185]

GENE P. FOPP

resumed the stand on rebuttal and testified as follows:

Direct Examination

Q. (By Mr. M. O'Connell): Mr. Fopp, when was the first time that you talked to Chester Guith in connection with this case?

(Testimony of Gene P. Fopp.)

A. October 12, 1954.

Q. October 12, 1954? A. Yes, sir.

Q. And where did you talk to him?

A. On the field a short distance from his house, I would say possibly one quarter of a mile near the Gunsight Elevator about a mile off of Highway No. 2 north.

Q. Who was present at that conversation?

A. He and I were just present at the conversation; there were other workmen a short distance from the automobile but I removed him some more personally. I asked him to come and speak to me in confidence and we came to my automobile and I spoke to him there.

Q. What time of the day was it?

A. I started at 11:50 a.m. when I arrived.

Q. How long did you continue to talk?

A. By my notes I concluded it at 12:30.

Q. Could you tell us what that conversation was?

A. Yes. I introduced myself to him and displayed my [186] credentials so he would know who I was and advised him I came to talk with him concerning a serious matter; that the allegation had been made he was the father of a child born by a juvenile girl therefore it would be automatically statutory rape. I advised him that he need not say anything to me at all; that he was entitled to an attorney, and that anything that he did tell me could be used in a court of law against him. I then informed him of the identity of the girl who had the

(Testimony of Gene P. Fopp.)

child and the fact that she had named him as a person having had intercourse with her, the result of which was the child in question born October 2, 1954.

Q. Just a moment now. Was there any, did you notice any physical change in the defendant when you first announced what the nature of the charge was? A. Yes, sir.

Q. What was the change?

A. Well he became quite concerned and blood drained from his face and I suggested he sit down in the car. We continued our conversation either on the side of the car or inside of the car.

Q. And what was that conversation?

Mr. J. J. O'Connell: Now just a minute. I want to object to the general broad character of this question and the danger of incompetent and inadmissible evidence coming in without any opportunity to object and to keep it [187] from the jury and I think the question should be in detail.

Mr. M. O'Connell: Just a moment. I withdraw the last question.

Q. (By Mr. M. O'Connell): Tell me during the course of that conversation did Chester Guith admit or did he not admit having intercourse with Eleanor Gobert? A. He admitted.

Mr. J. J. O'Connell: Now just a minute. Your honor, to which we object on the ground that this actually amounts to confession rather than admission and there has been no proper foundation laid for any admission of a confession.

(Testimony of Gene P. Fopp.)

The Court: Overrule the objection.

A. He admitted having had intercourse with her.

Q. On one or more occasions?

A. On three or four occasions.

Mr. M. O'Connell: You may cross examine.

Cross Examination

Q. (By Mr. J. J. O'Connell): When was the first time you were called into the case, Mr. Fopp?

A. October 12th I think is when I had a phone call [188] from Dr. King advising me of the birth of the child and that she was a juvenile and therefore he felt there was a violation involving an Indian ward so I drove up to Cut Bank and commenced the investigation.

Q. Did you talk with her?

A. I spoke to her to a limited extent in view of her condition at that time. I wasn't able to get very much information from her, however.

Q. Did she tell you then that Guith was the father of that baby?

A. On the first day?

Q. On the first day?

A. Yes.

Q. What did you mean then when you say you were only able to get limited information?

A. When I first talked to her she said she only had intercourse with Mr. Guith only once and after I talked to Mr. Guith and he admitted three or four times I went back and expressed concern over the fact she had to tell me everything and not only a portion of the story and then she admitted she had intercourse three or four times with the defendant.

(Testimony of Gene P. Fopp.)

Q. Did you ask her about intercourse with anybody else? A. I did.

Q. Did she deny intercourse with anybody else?
A. She did.

Q. Name any other boys?

A. She stated she had never gone out with another boy.

Q. Did you ask her why she had not revealed her condition to anybody? A. I did.

Q. I mean were you impressed as an officer by the fact that she withheld this all this time?

A. Yes, it was very unusual to have fooled everyone, including the doctor.

Q. Now you said there was some physical change that came over Mr. Guith?

A. Just the ordinary expression of concern and blood draining from the face.

Q. Do you know even an innocent person accused of a crime have the same reaction?

A. I would say it would vary but I would say some I am positive would have.

Q. As a matter of fact as an agent of the F.B.I. you talk about offenses with various people who eventually have proven innocent and they have had the blood draining? A. Yes, sir.

Q. Now you said you advised him he didn't have to talk? A. Yes, sir.

Q. You told him he had a right to get an attorney? [190] A. Yes, sir.

Q. And you told him of all his constitutional rights?

(Testimony of Gene P. Fopp.)

A. The Constitution is a voluminous document; I couldn't tell him all of them; I told him exactly what I have told in court, that he was entitled to an attorney, that he need not say anything at all, and that anything he did say could be used in a court of law against him.

Q. Didn't you make any threats?

A. No, sir.

Q. You made no threats at all.

A. No, sir.

Q. You never threatened if he didn't talk to you and come up and tell you about it that it would go hard with him?

A. No, sir. May I qualify that statement. There is a variance. Mr. Guith did ask me how much he would get, if he would get 10 years. I told him I did not know, it was up to the court, it was up to the United States Attorney, that the F.B.I. is purely a fact finding organization. He also asked me to recommend an attorney, at which time I told him I could not recommend any attorney, that it was his own problem to find a suitable attorney, that I might recommend an attorney who later turned out to be not the proper attorney and therefore the fault would be mine.

Q. Now on how many occasions after the 12th of October [191] did you see him?

A. On November 4 and January 20. I think it was November 4. I can refer to my notes.

Q. November 4, 1954?

A. 1954 and January 20, 1955.

(Testimony of Gene P. Fopp.)

Q. Is January 20, 1955, the last time that you saw him?

A. No, I have seen him since then, just visually but I don't believe I have talked to him since January 20, 1955.

Q. You haven't talked with him since then?

A. I don't think so. Not that I can recall.

Q. Did you talk to him after he had retained me as an attorney?

A. Yes, sir. Well, I wish to retract that to some degree. I do not know who he retained as an attorney; I asked him and he refused to tell me; he told me he had an attorney but that was the only information I obtained.

Q. On that occasion did he admit or deny the accusation?

A. He denied all the accusations on that occasion; that was on November 4 I am speaking of now.

Q. November 4, 1954?

A. The second time I talked to him he denied having had intercourse, the third time which was January 20 we discussed it very briefly because all I asked of him was a privilege to take a photograph of the premises which he stated he did not wish to do without consulting his attorney. [192]

Q. So on one occasion your testimony is he admitted it and on another occasion he denied it?

A. Yes, sir.

Mr. J. J. O'Connell: That is all.

The Court: Is that all, Mr. O'Connell?

(Testimony of Gene P. Fopp.)

Mr. J. J. O'Connell: Yes, I said that is all.

The Court: Any further questions?

Redirect Examination

Q. (By Mr. M. O'Connell): Do you recall the words used by Chester Guith on October 12th during that conversation when he denied any intercourse, or was that November 4th?

A. On November 4th, yes, sir, but to refer to it exactly I would have to look at my notes.

Q. Do you have your notes with you?

A. Yes, sir.

Q. Are they in your own handwriting?

A. Yes, sir.

Q. Will you please refer to them?

Mr. J. J. O'Connell: We object to him using them unless there is also some showing they were made at the time or close to the time.

The Court: You may lay that foundation. [193]

Q. (By Mr. M. O'Connell): Mr. Fopp, those notes you have in your hand when did you make those?

A. I made them shortly after having interviewed him. I interviewed him at 5:30 to 6:15 p.m. on November 4, 1954 and made the notes in my own handwriting shortly after dinner the same day in the hotel room.

Q. And would you tell us the essence of his denial in obtaining those notes?

A. He stated that he wanted to change his story as to what he had told me on the first occasion. I

(Testimony of Gene P. Fopp.)

told him that I couldn't change the story but I would be glad to convey anything else he wanted to add or change in his statement, that I couldn't change the story completely. He then stated that we had been talking about two different things. I have here a note, difference between intercourse and personal contact. He then stated he did not have intercourse with her but monkeyed around with her twice, and that was in April, and he knew it was April because his farm machinery was repaired and ready to go. He said on both occasions she had on boy's jeans with a zipper down the front and that he inserted his penis into the pantsfly. I don't know whether I should——

Q. Will you please go ahead and read?

A. He said he took about four strokes and there was [194] no ejaculation, and that was the essence of my notes here.

Q. That is the statement which was made contrary to the statement received by you from Mr. Guith on October 12, 1954? A. Yes, sir.

Q. And you spoke of the term sexual intercourse on October 12, 1954, with Mr. Guith.

A. Yes, sir, and I asked him if he knew what it meant.

Q. And it was after understanding the meaning of the term, was it after that? A. Yes, sir.

Q. That he told you he had had intercourse with her?

A. Yes, sir. May I explain that the question in the defendant's mind to begin with was that of

(Testimony of Gene P. Fopp.)

paternity not of intercourse, and it took some time for me to convey to him that we were not concerned with the question of paternity, that it was not the feeling between him and the Goberts but that I was representing the F.B.I. in the interests of the people on a criminal charge and we weren't concerned with paternity. It was after that when he realized the question of paternity was not our main interest; it was then that his attitude changed and, in fact, I asked if he wished to give a signed statement at that time and then he said, "No."

Mr. M. O'Connell: You may cross examine. [195]

Recross Examination

Q. (By Mr. J. J. O'Connell): Now you went through, Gene, and repeated words there, were those Guith's words or were those the words you would put them down as you recalled?

A. Guith's words?

Q. Were those Chester Guith's words or were those words you would put down as you recalled?

A. Mr. O'Connell, in view of the argumentative nature of the interview with the defendant on November 4 I was very particular to make sure I put his words in quotes which was "monkeyed around". And also the words——

Q. I mean did you write them down right there?

A. Not right there.

Q. Well when?

A. I would say possibly within an hour and a half.

(Testimony of Gene P. Fopp.)

Q. An hour and a half after you got back to Cut Bank?

A. Yes. Well at 6:15 I concluded the interview. I went into Cut Bank and went to the hotel.

Q. Did you show Mr. Guith this statement with these words? A. No, sir.

Q. He never had an opportunity to see them?

A. No, sir. [196]

Q. Or an opportunity to admit or deny them?

A. No, sir.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: Nothing further.

Mr. M. O'Connell: I would like to call Mrs. Gobert.

MRS. ROSELLE GOBERT

was called as a witness on plaintiff's rebuttal and testified as follows:

Direct Examination

Q. (By Mr. M. O'Connell): Would you tell us your name, please?

A. Mrs. Roselle Gobert.

Q. Where do you live?

A. I live on Seville Flats about 10 miles west of Cut Bank.

Q. And is that on the Blackfeet Reservation?

A. Yes.

Q. What is your husband's name?

A. Edward M. Gobert No. 2.

Q. Are any children living at home with you now? A. There are three.

(Testimony of Mrs. Roselle Gobert.)

Q. How many children do you have altogether?

A. Nine. [197]

Q. And is Eleanora Gobert a daughter of yours?

A. Yes.

Q. And how long has she lived in the house there with you?

A. All her life.

Q. Have you been in position as her mother to observe her social activities with boys?

A. Yes. You mean if I know that she has social activities with boys?

Q. Yes.

A. Well if she did I would be in position to know, I mean if she went out with boys or anything like that I would be in position to know.

Q. Does Eleanora go out with boys?

A. No, not to my knowledge.

Q. And where does she go after school, do you know?

A. She comes straight home on the bus.

Q. Does she go out evenings?

A. No.

Q. Does she go out on weekends?

A. No.

Q. Does she ever go out and stay overnight?

A. No.

Q. How often does she go to town?

A. Well sometimes Saturday afternoon when she is home [198] from school.

Q. And who does she go to town with?

A. With me and her father.

Q. And what time does she come home?

A. Well it depends, sometimes we get through shopping early and we come straight home, if the

(Testimony of Mrs. Roselle Gobert.)

weather is cold we come straight home, if not usually we go to my sister to visit sometimes and we don't get home until quite late and she is with us all the time.

Q. And when you say she is with us who do you mean by us? A. Me and her father.

Mr. M. O'Connell: You may cross examine.

Cross Examination

Q. (By Mr. J. J. O'Connell): Now as I understand it, Mrs. Gobert, you want to testify that your daughter the only time she has gone out was with you and your husband? A. Yes.

Q. Never been out on any other occasion?

A. You mean—how do you mean on any other occasion?

Q. Well I mean for instance to go into town to the theater or to go out with the kids? [199]

A. Well whenever she goes to a theater we usually stop at my sister's like I said and her dad takes her to the show and goes back after her, and sometimes she walks back home with her cousins, her cousin Karen Brown and her sister and Eleanora's brother.

Q. How long a period has this gone on?

A. Occasionally.

Q. Well I mean how long a period has this close supervision of her by you and your husband gone on?

A. Well this supervision has gone on in our family with all our girls until they are of age.

(Testimony of Mrs. Roselle Gobert.)

Q. Until they are of age?

A. Yes, we raised six girls.

Q. And you never let them go out with the boys until they get what? A. Of age.

Q. What do you consider of age?

A. Eighteen.

Q. And up to that time you never let them go out by themselves? A. No.

Q. And if she goes to town, she goes with you and your husband? A. Yes.

Q. You have been with her when she has gone up to the [200] Cruse's cabin?

A. She never has gone to Cruse cabin.

Q. Never gone? A. No.

Q. You heard your husband testify?

A. That is her sister, oldest sister, Roselle, the same name as mine; and she did go with the Cruse's daughter and they were with Janis' parents, Mr. and Mrs. Cruse.

Q. And Eleanora didn't go? A. No.

Q. Did I get the impression from some of your testimony the times she was out with Karen Brown when you were not there?

A. No, I said she walked home from the show with her sometimes but she wasn't out with her.

Q. Is Karen Brown the girl who talked to her about sexual intercourse and what it was and so on?

A. Not to my knowledge; I didn't know Karen Brown talked to her about sexual intercourse.

Q. Were you present in the courtroom when Eleanora testified?

(Testimony of Mrs. Roselle Gobert.)

A. Yes, but I never heard Karen talk about it.

Q. You didn't hear it?

A. No, but I heard it yesterday when she mentioned it here on the stand. [201]

Q. I mean have you ever had any parties at your house?

A. Parties at my house; how do you mean?

Q. I mean have you for the children, for the girls, for your family? A. No.

Q. Birthday parties or social parties of any kind? A. No.

Q. Have any children gone with boys or girls to plays or to visit or anything of that kind?

A. Well the neighbor children, that is the neighbors, a little boy comes from Watson's, the next farm east of us; he is about 8 years old.

Q. And he is the only one?

A. And my brother's two children, two little girls, one 4 and one 6.

Q. Do you remember Eleanora riding a bicycle?

A. Yes.

Q. Do you remember her going off riding on the bicycle with another boy at night? A. No.

Q. You don't recall any occasion? A. No.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: No further examination.

Mr. M. O'Connell: The United States rests, your honor. [202]

Mr. J. J. O'Connell: If it please the court, I would like to call Mr. Guith in sur-rebuttal.

The Court: Very well.

CHESTER GUTH

resumed the stand and testified as follows:

Direct Examination

Q. (By Mr. J. J. O'Connell): You are the same Chester Guith who testified previously and you were previously sworn? A. Yes.

Q. You were present when Mr. Fopp testified just a few minutes ago? A. I was.

Q. Did you hear his statement that when he talked with you on October 12th, 1954, that you admitted having sexual intercourse with Eleanor Gobert? A. I heard that statement.

Q. Is that statement true or false?

A. That is very false.

Q. Did you admit to him that you had sexual intercourse with her not only on one occasion but three or four occasions?

A. I never said no such a thing.

Q. Now did Mr. Fopp on the occasion that he took you into the car on October 12, 1954, and as he said advised you [203] what all your rights were and right to have an attorney and so on, did he make any threats?

A. Well he says to start with you can talk if you want to or you don't have to. I said, "What if I don't say anything?" And he said, "If you do not, we will have a warrant sworn out for you and we will get you in and you will talk."

Q. That is what he says? A. Yes.

Q. Now you heard his testimony that—was that the first time you had ever been contacted by a law

(Testimony of Chester Guith.)

enforcement officer? A. That is right.

Q. Was that your first experience with somebody coming from the Government accusing you of a crime? A. Yes.

Q. You have never been previously arrested for any offense? A. I haven't.

Q. Now you heard his statement that you asked him about the number of years you could get for this crime?

A. I never asked him that.

Q. Were you frightened? Did you get scared when he accused you of this?

A. Absolutely I was very surprised with the charge. [204]

Q. Now on November 4th, 1954, Mr. Fopp saw you again, is that correct, you heard his testimony to that effect? A. Yes.

Q. At that time you denied the accusations that were made against you, is that correct?

A. I did.

Q. Now you heard him read from a report which he had made and in which he said he was reviewing your words, he had put them in quotes, that you wanted to change your story, then you then stated you had no sexual intercourse but that you monkeyed around with her, did you make any statement of that kind?

A. I never made that statement; I never had anything to change.

Q. He also says you went on to say you inserted your penis into her pantsfly, took about four strokes

(Testimony of Chester Guith.)

but there was no ejaculation, did you ever use the word ejaculation? A. No.

Q. Do you know what the word "ejaculation" means? A. Well, yes, I believe I do.

Q. I mean is that the term you usually use for what that means? A. No.

Q. Now you heard Mrs. Gobert's testimony? But let me ask you did you insert your penis into the pantsfly of [205] Eleanora Gobert? A. No.

Q. Or did you take any four strokes?

A. I never.

Q. Now you heard Mrs. Gobert's testimony that Eleanora had never gone out with any boys?

A. Yes.

Q. Have you had occasion to see Eleanora out with boys? A. I have.

Q. When? A. It was in the fall of '43.

Q. '43? A. It was.

Q. '43? A. Or, excuse me, '53.

Q. '53, and was she alone with a boy?

A. Yes.

Q. What were they doing?

A. They were about three-fourths of a mile or approximately that east of the Gobert ranch, about 11:30 at night, and they were riding, each one had a bicycle riding toward home.

Q. Was anybody with them? Was Mrs. Gobert or Mr. Gobert? A. No. [206]

Q. They were by themselves?

A. They were by themselves.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: No cross examination.

Mr. J. J. O'Connell: That is all.

The Court: Do you have any special instructions on the case?

Mr. J. J. O'Connell: Your honor, I have.

The Court: Has the United States Attorney any?

Mr. M. O'Connell: No special instructions, your honor.

Mr. J. J. O'Connell: I just have four, your honor. If we could have a short recess?

The Court: Yes, we will take a short recess. You both better come into Chambers, I want to talk with you a minute. (3:15 p.m.)

Court resumed, pursuant to recess, at 3:30 p.m. at which time the jury, defendant and counsel for the parties were present.

The Court: Ladies and gentlemen of the jury, I have decided to give you a little rest from further consideration of the case until tomorrow morning at nine o'clock. We will start at nine so we will be sure and get a good start, so you will have ample time to consider the evidence after you retire to the jury room. And you know the admonition of the [207] court not to talk to anybody about the case or allow anybody to talk to you about it or discuss it among yourselves or form or express any opinion as to the guilt or innocence of the defendant until the case is finally submitted and return here tomorrow morning at nine o'clock. Court is adjourned until tomorrow morning at nine o'clock. (3:40 p.m. June 10, 1955.)

Court resumed, pursuant to adjournment, at 9:00 o'clock a.m. on June 11, 1955, at which time the jury, the defendant and all counsel for both parties were present.

The Court: Well, gentlemen, I believe the next order of business here is the arguments.

Mr. J. J. O'Connell: Your honor, if the court would forgive me, yesterday afternoon I forgot to make a couple motions which I would like to have made and I wonder if the court would give me permission and leave to do so at this time, one motion under the rules to be made in the presence of the jury and one motion without the presence of the jury. Its to preserve them for the record.

The Court: Have you consulted with counsel for the Government about it?

Mr. J. J. O'Connell: No, I haven't, your honor.

The Court: Do you know what it is about?

Mr. M. O'Connell: No, your honor, I have no idea. [208]

The Court: Well you are out of order.

Mr. J. J. O'Connell: They are motions largely to preserve the record, your honor.

The Court: The same motions you have made before?

Mr. J. J. O'Connell: One is the same motion I made before.

The Court: And what is the other about?

Mr. J. J. O'Connell: The one is to strike the testimony of the witness Fopp with reference to confession.

The Court: All right, you can make your motions, go ahead.

Mr. J. J. O'Connell: Your honor, at this time comes the defendant and moves to strike the testimony of the witness Fopp with reference to statements made to him by the defendant Guith in the course of his conversation with respect to his involvement in this, the crime alleged in the indictment on the grounds such statements would constitute a confession and there was no proper foundation laid for the admission of such a confession, and, further, in view of the testimony of the defendant Guith that threat was made to him of prosecution.

The Court: Don't prolong it and make a speech to the jury, end your motion.

Mr. J. J. O'Connell: That is the motion, your honor. [209]

The Court: The motion is denied.

The Court: Now the next motion is to be made without the presence of the jury.

Mr. J. J. O'Connell: Yes.

The Court: All right, the jury may retire for a few moments to the corridor until this motion is made.

Whereupon the jury retired from the courtroom.

Mr. J. J. O'Connell: Comes now the defendant, your honor, and moves the court for a judgment of acquittal for each of the following reasons: 1. That the Government has failed to prove that the Guith ranch on which the crime was alleged to be committed is not Indian Country as alleged in the

indictment, and on this argument our evidence is further bolstered by the testimony of Mr. Guith that the land was deeded to him and it was purchased on tax deed from Glacier County and it was not within Indian Country so that the Government has failed to prove the crime charged, that there has been no proof of penetration of the female sexual organ of the prosecutrix, and further bolstered by the testimony of Mr. Guith.

The Court: The motion is denied. Call in the jury.

The Court: You may proceed.

Whereupon the jury returned to the jury box in the courtroom.

The Court: Mr. District Attorney, you may proceed with [210] your argument.

Whereupon Mr. M. O'Connell made the opening argument to the jury.

The Court: Mr. O'Connell.

Whereupon Mr. J. J. O'Connell made the argument in behalf of the defendant to the jury.

The Court: We will take a recess for 15 minutes. (10:30 a.m.)

Court resumed, pursuant to recess, at 10:45 o'clock a.m., at which time the jury, the defendant and the counsel for the parties were present.

The Court: Proceed, Mr. District Attorney.

Whereupon Mr. J. O'Connell made the closing argument to the jury.

The Court: Ladies and gentlemen of the jury, in looking into your faces I see no disappointment

indicated there that we are nearing the conclusion of this sordid case.

Notwithstanding the nature of the case I have been impressed with your courage and fortitude and your interest manifested throughout this trial in what has been said and done. As you looked at the witnesses and then by your expressions you have shown that you are good citizens, that you will make good jurors and good officers of this court such as you really are, being sworn as jurors to well and truly try the issues in this case and a true verdict find. [211]

In all of these criminal cases after the evidence is concluded it then becomes the duty of the court after the arguments of counsel by these gentlemen here, who are also officers of the court on both sides, it then becomes the duty of the court to advise you as to the rules of law that apply for reference to a case of this kind. And that is done, of course, to the better enable you to reach a verdict after you have retired to your jury room and have deliberated on the case.

You, as you know, are the sole judges of the facts in the case. You are clothed with great authority, perhaps greater authority than the Judge or any other officer of the court. Greater confidence is placed in you by the law of the land. You are serving under a system that has been in vogue for about 600 years, and thus far it has appeared to be the best system we know of of handling the facts in both civil and criminal cases in courts of justice.

As I said, you are the sole judges, you judge the

credibility of the witnesses that you see and hear on the witness stand. You judge of the weight to be given testimony. You judge of all the circumstances that you see and observe through the trial of a cause, so that after you retire and deliberate you will be able to form your judgment as to what you should do in the case, whether you believe the defendant has been proved guilty beyond a [212] reasonable doubt.

Now in this case the Grand Jury has found an indictment against the defendant Chester Guith, charging him with the crime of rape.

I believe this indictment has already been read to you twice but I am going to read it again so you will have the contents in mind while I pursue other things in reference to the instructions to be given you.

“That on or about the 9th day of January, 1954, at the Guith ranch, approximately ten miles west of the city of Cut Bank, and at a place within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, and within the State and District of Montana, the defendant, Chester Guith, did willfully, unlawfully, and feloniously have sexual intercourse with one Eleanora Gobert, a female Indian person of the age of fifteen (15) years and not at said time the wife of said defendant.”

Now before I overlook it it has been stated here by counsel that proof has not been submitted that this is within the Indian Country. And I want to disabuse your minds of that situation right at this

time. When you started there was testimony in this case that the Guith ranch is within the exterior boundaries of the Blackfeet Indian Reservation, and that is sufficient, so I need not give that question further consideration. [213]

Now the law, I should call your attention, of course, to the law upon which this information is based. I am reading from Section 1152 of the United States Code Annotated, Title 18:

“Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.”

And from Section 1151:

“Indian country defined. Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, * * * .”

Now the federal statute upon which this indictment rests is found in Section 2032 of Title 18 United States Codes Annotated, and it reads, as follows:

“Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first

offense, be imprisoned not more than fifteen years, and for a subsequent [214] offense, be imprisoned not more than thirty years.”

Within the territorial jurisdiction of the United States, and that requires some definition and that is found in Title 18, United States Codes Annotated, Section 7, subdivision (3) which illustrates the meaning of that, what I have just read to you. Subdivision (3):

“Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.”

You will note then that would be any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, which fits this case precisely.

Now, ladies and gentlemen, in respect to this indictment, you, under the charges contained here you have the power and authority as you find the evidence to be to find this defendant guilty or not guilty, but you will remember that this indictment in itself is not to be considered by you any evidence whatsoever against the defendant.

This is merely a written form handed down [215] by the Grand Jury for the purpose of acquainting us with the nature of this charge so that we will know what it is about, all we who are interested here, the jury and the officers of the court; it is

merely for that purpose, and the defendant, of course, acquainting him with the knowledge of it.

Now the defendant has entered a plea of not guilty under this charge and under that plea arises what in law we term the presumption of innocence, which means that the defendant is presumed to be innocent until he is proved guilty beyond a reasonable doubt. And this presumption is to remain fixed in your minds from the beginning to the end of the trial so that when you come to your final conclusion you will then be able to determine whether notwithstanding the presumption of innocence you believe the defendant has been proved guilty beyond a reasonable doubt if you so believe.

Now then, ladies and gentlemen, you were selected to sit in the trial of this cause because you appeared to be fair, you appeared to have no knowledge whatsoever of the case, you had no acquaintance with anybody connected with this trial, lawyers on either side, except Mr. Shell, one of the jurors, who said he was acquainted with defendant's counsel but that that would make no difference, that he could hear the evidence fairly and [216] decide the issues here, or words to that effect.

So that it appears that you had no bias or prejudice one way or the other, and you had no opinion whatsoever as to the guilt or innocence of this defendant and that is the proper state of mind for jurors to be in when they enter upon the trial of a cause.

Now I spoke of reasonable doubt. You have often heard that phrase. It is the popular phrase in the

lawbooks and mentioned in all the criminal cases and some of the definitions that are given are rather long and complicated and full of legal verbage and I wonder that the jurors could understand just exactly what the meaning is. I have heard such definitions given in instructions. But really the phrase itself almost affords you a complete definition, a reasonable doubt, a doubt for which you can find a reason, a good reason, a substantial reason based upon the evidence, the character of the evidence or the lack of evidence.

If after you have considered all of the evidence in this case, that which is favorable as well as that which is unfavorable you feel that you have an abiding conviction to a moral certainty of the truth of the charge, then you are said to have no reasonable doubt, and it would be your duty to convict the defendant.

On the other hand, after so considering [217] all of the evidence in the case, that which is favorable as well as that which is unfavorable, you feel that you have not an abiding conviction to a moral certainty of the truth of the charge, then it would be equally your duty to acquit the defendant.

Now you understand the force and effect of that language I have used on that definition, an abiding conviction to a moral certainty. We might substitute other words, an abiding, continuing, a belief, a sincere belief to a very high degree of credibility that the case is so, that the case has been established to your satisfaction beyond a reasonable doubt.

Of course, it would be impossible to prove one of these cases to a mathematical certainty of such certainty as required in the sciences and the law does not so require but that you should satisfy it beyond a reasonable doubt.

Now, as I said before, you are the sole judges of the facts in the case, the weight to be given testimony, the weight to be given circumstances, credibility of witnesses. You have an opportunity to see the witness upon the stand. You will note the witness' manner of testifying; you note whether the witness is frank, candid and outspoken or whether the witness is evasive or speaks in monosyllables or has a poor memory about some important [218] matters about which the witness is questioned. You know what interests or relationship exists on the part of the witness so testifying and you give particular attention to that if some interest or bias or prejudice or relationship is shown there.

You know, the office of the witness in the courtroom is to speak the truth and nothing but the truth, and the presumption is that witnesses do speak the truth, but that presumption may be repelled by the witness' manner of testifying, by contradictory evidence, by the character of the evidence and all those things you are to take into consideration, to weigh and consider and deliberate and discuss among yourselves when you retire.

If you believe that any witness has wilfully testified falsely to a material fact in the case, you have a right to disregard that testimony altogether, or you may find upon comparison of that witness'

testimony with some other witness who has testified in the case that there are points of corroboration and you may decide after you have considered it all and refreshed it in your minds and in your discussions that you can accept a part of that witness' testimony that you have some disbelief about so that you may, as you conclude, decide to accept it in part and reject it in part, but all that is left to your judgment after thoroughly considering it.

Now there is another point at issue here and that is the question of intent; if you believe beyond a reasonable doubt that the defendant committed the crime as charged in the indictment, what was the intent.

In addition to that the jury must find that the defendant acted, if he acted at all, with a criminal, that is to say, with an evil intent. And in order to discover what that intent is you must have resort to all of the circumstances in the case, to all of the evidence that has been presented here and then determine what you consider the intent to have been, if you believe he acted in accordance with the charge contained in the indictment.

Now then there are several instructions aside from the various instructions I have given you that should be taken into account in this case.

For instance, as to the crime of rape itself. You are instructed that any act of sexual intercourse accomplished with a female not the wife of the perpetrator and under the age of 16 years is rape, and it is immaterial whether the female under the age of 16 years consented or did not consent to such

act. Any sexual penetration however slight is sufficient to complete the offense.

The essential guilt of rape consists of the [220] outrage to the person and feelings of the female involved, therefore, any sexual penetration however slight is sufficient to complete the crime if the other requisite facts are present. Proof of emission is not necessary.

A charge such as that made against the defendant in this case is one that is easily made and once made difficult to disprove even if the defendant is innocent. From the nature of a case such as this the complaining witness and the defendant usually are the only witnesses, therefore, I charge you that the law requires that you examine the testimony of the prosecuting witness with caution.

Although evidence was offered for the purpose of showing that on more than one occasion acts of sexual intercourse were indulged in and improper familiarity existed between the defendant and the prosecutrix, you are not permitted to deliver a verdict of guilty in this case unless you find that the defendant committed the specific offense which the prosecution alleges was committed in the indictment on January 9th, 1954, at the Guith ranch.

The defendant is here on trial for only that offense which is charged in the indictment and upon which the Government has elected to rely.

But you may not arbitrarily and capriciously disregard testimony of a witness who is not impeached in [221] any of the usual modes known to the law, but whose testimony is reasonable and consistent

with all the circumstances proved bearing upon the material issues involved in this case. The usual modes of impeachment of a witness known to the law as mentioned in the preceding instructions are: 1. By proving contradictory statements previously made by the witness as to matters relevant to his testimony in the case. 2. By disproving facts testified to by him. 3. And by evidence as to his general bad character. But whether a witness has been impeached is solely for the jury to determine from all the evidence in the case.

The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact in this case. A witness entitled to full credit is one whose statements upon the witness stand are within reason and believable.

Now as to the testimony of the defendant as a witness in the case. The defendant in a criminal case may be sworn and may testify in his own behalf. In such a case the jury in judging of the credibility and weight to be given his testimony may take into consideration the fact that he is the defendant, and the nature and seriousness of the crime of which he is accused, and what it would mean to him if he were to be convicted.

You have no right, however, to disregard [222] the testimony of the defendant on the ground alone that he is the defendant and stands charged with the commission of a crime. You should fairly and impartially consider his testimony together with all of the other evidence in the case, and if upon all the evidence you have a reasonable doubt as to his

guilt of the crime charged in the indictment herein, it is your duty to acquit him.

Now evidence as you recall has been introduced in the case relating to the reputation of the defendant for truth and veracity. Now on that subject witnesses have testified to the good reputation of the defendant; good reputation always goes to one's credit if it has been established to your satisfaction, you being the sole judges of the facts, but good reputation alone, if you believe the testimony of the witnesses, will not override the case made out against the defendant beyond a reasonable doubt. You should consider the testimony in regard to good reputation in connection with all the other evidence in the case, and then weigh it carefully, all of it, and determine whether you believe the Government has sustained the burden of proof and made out a case against the defendant beyond a reasonable doubt.

The defense of alibi appears in the case and here is an instruction in regard to how you should consider an alibi. [223]

The jury are instructed that one of the defenses made by the defendant Chester Guith in this case is what is known as an alibi; that is, that the defendant was in another place at the time of the commission of the crime. This is a proper defense, if proved, and if in view of all of the evidence of the case the jury have a reasonable doubt as to the presence of the defendant at the time and place where the crime is alleged to have been committed,

they should give the defendant the benefit of the doubt and find him not guilty.

As you have noted, this is a felony case, all 12 of your number must agree in order to find a verdict and your verdict must be unanimous, and each juror should decide for himself and herself upon the evidence in the case and upon the law as given you by the court as to what his verdict will be. No juror should yield his deliberate conscientious conviction as to the guilt or innocence of the defendant either at the instance of the majority of the jury or for the sake of unanimity or to prevent a mistrial but hold to it, and you are further instructed that nothing in this instruction is to be taken to mean that you shall not fully and fairly discuss among yourselves all the evidence and the facts surrounding the case as disclosed by the evidence, or that any of your members shall not be open to conviction by honest argument by any member [224] or members of the jury founded upon the evidence produced upon the trial or upon the law as given you by the court.

Now in reference to statements that have occurred here, statements made by one and testified to by another. Claimed oral statements testified to by witnesses during the trial belong to a class of evidence to be considered and weighed by the jury with caution.

It sometimes happens that a witness testifying to an oral statement made by a person might use a word or phrase conveying a meaning or impression not intended by the person making such oral

statement, or the latter may have used a word or phrase unintentionally conveying a meaning he did not intend so mistakes and misunderstanding may occur which the jury should consider with great care. But on the other hand when such oral statements are testified to by intelligent and credible witnesses they may be entitled to great weight and the jury as in all issues of fact are the sole judges of the weight to be given such oral statements and the credibility of the witnesses so testifying.

Now in this case you have noted certain witnesses testified known in the law as an expert witness. A witness testified in this case known in the law as an expert because of his special knowledge in certain lines of endeavor acquired by long study and experience, and in [225] this particular case I am referring to medical science, the testimony of Dr. King.

The testimony of expert witnesses is to be considered and weighed just the same as that of other witnesses in the case and there is no rule which requires you to give it a higher standing in this cause than the testimony of other intelligent and credible witnesses who testified to material facts in the case. The testimony of experts like that of other witnesses who have appeared in the case should be given such weight in your judgment as you believe it ought properly to receive.

Now your power of judging. You are instructed that your power of judging the effect of evidence is not arbitrary but is to be exercised with legal discretion and in subordination to the rules of evi-

dence. You are not bound to decide in conformity with the declaration of any number of witnesses which does not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

That a witness false in one part of his testimony is to be distrusted in others. That evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict, [226] and, therefore, if the weaker and less satisfactory evidence is offered with the appearance that stronger and more satisfactory evidence is within the power of the party, the evidence offered should be viewed with caution by you.

As I have heretofore said, you are the sole judges of the effect, value and weight of the evidence in this case, and of credibility of witnesses. It is solely and exclusively your duty to determine the facts and this you must do from the evidence presented to you and apply the law as given you in these instructions to the facts as you find them.

Every witness who has testified in this case is presumed to have spoken the truth; this presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony or by contradictory evidence.

In determining the credibility of any witness you are to take into account in weighing his testimony his interest or want of interest in the result of the case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want

of candor, his apparent intelligence or lack of intelligence, his means of knowledge as to any facts about which he testified, his apparent fairness or lack of fairness, [227] and whether he is supported or contradicted by the facts and circumstances in the case as shown by the evidence.

In determining what are the facts in this case you are not bound to decide in conformity with the statements of any number of witnesses producing conviction in your minds against a less number or against other evidence satisfying your minds, or against a presumption created by law.

Now you will not be influenced by colloquies or disputes during the trial between counsel or between counsel and the court, or between the court, or counsel and the witnesses, or remarks or statements not based upon the evidence.

You will base your verdict solely upon the evidence submitted to you and wholly disregard remarks of counsel not based upon the evidence, and wholly disregard anything you may have heard or read outside of the evidence and any evidence erroneously admitted and afterwards excluded you will also disregard.

And I find one instruction left here in regard to intent and I will read it to you again. Now in every crime or public offense there must be found to exist a joint operation of act and intent.

Of course, you can't look into the mind of the defendant and determine with what intent he [228] committed the act, if you find he committed it, but you may have recalled circumstances and all the

evidence produced here on the trial, bearing in mind that a sane person is presumed to intend the natural and usual consequences of his own deliberate act; that you must be satisfied from all the evidence beyond a reasonable doubt that he acted, if he acted at all, with criminal, that is to say, with evil intent before you convict the defendant.

Now, of course, in this case you are bound to find conflicts in the evidence and you just wonder sometimes and study and you will undoubtedly have considerable discussion when you retire to the jury room as to these conflicts in the evidence. Well at the end of it you may find that some of the conflicts you have discussed among yourselves are irreconcilable; if you find that such a state exists after your discussions and arguments, then you must accept such evidence as you believe, after consideration and discussion, is most worthy of your belief, and then give it such weight as you think it ought properly to receive, all being left to your judgment, you being the sole judges of the facts of the case.

Now it takes twelve of your number to agree on a verdict. You will select one of your number [229] to act as foreman and he or she will sign the verdict after you have agreed. You will be given the information to consider and the exhibits in the case. I believe there is only one or two exhibits but whatever there are they will be given to you to examine in the jury room, and also copies of the verdicts so that you can determine which one you are to use.

The Court: Have the bailiffs been sworn?

Mr. J. J. O'Connell: Your honor, if the court please, I want to make just a couple of exceptions.

The Court: You wait a minute. Sit down there until I get through.

The Court: Swear the bailiffs.

Whereupon the bailiffs were duly sworn.

The Court: Now you gentlemen on both sides may come over here to this desk and sit down and in the presence of the jury note your exceptions but not within the hearing of the jury; it is to be done quietly and in an undertone.

Mr. J. J. O'Connell: Comes now the defendant and excepts to that instruction of the court instructing the jury that the Guith ranch is within Indian country and the jury should not consider this point on the grounds that the evidence clearly shows the Guith ranch is not in Indian country and not subject to the jurisdiction of the United States, and on the further ground that the [230] instruction invades the province of the jury.

Comes now the defendant and excepts to that instruction of the court dealing with Section 7, subdivision 3, of the United States Codes Annotated concerning the territorial jurisdiction of the United States, and particularly excepts to that part of the instruction which holds that this section applies to the case at bar on the grounds that the Guith ranch where the alleged offense was alleged to be committed is not within the territorial jurisdiction of the United States, and on the further ground that the United States has reserved no right of jurisdiction in said Guith ranch, and that the evi-

dence clearly shows that said Guith ranch is owned by the defendant by virtue of a deed granted by Glacier County, Montana.

Mr. J. J. O'Connell: That is all.

Mr. M. O'Connell: No exceptions.

The Court: You are through dictating your exceptions, are you, on both sides?

Mr. J. J. O'Connell: Yes, your honor.

Mr. M. O'Connell: Yes, your honor.

The Court: Very well, the jury may retire and deliberate on its verdict. It is so nearly noon you better take them to lunch. Perhaps you better take them to their jury room first and then at twelve o'clock or [231] shortly after you can take them to lunch. (11.50 a.m. June 11, 1955.)

Court resumed to receive the verdict of the jury at 5:15 p.m. on June 11, 1955, at which time the jury, the defendant and counsel for both sides were present.

The Court: Ladies and gentlemen, have you reached a verdict?

Foreman: We have, your honor.

The Court: Very well, let's have the verdict.

Whereupon the bailiff delivered the verdict from the foreman to the Judge.

The Court: Very well, read and record the verdict.

The Clerk: Your verdict, ladies and gentlemen of the jury:

"Verdict: United States District Court, District of Montana, Great Falls Division. No. 8503.

United States of America, Plaintiff, vs. Chester Guith, Defendant.

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the [232] indictment on file herein.

R. L. Adolphson,
Foreman.

We recommend leniency."

The Clerk: Is that your verdict as read so say you all?

The Court: Do you desire to have the jury polled?

Mr. J. J. O'Connell: Yes, may we, your honor?

Whereupon the clerk duly polled the jurors.

The Clerk: All have answered in the affirmative.

The Court: Very well, the defendant may stand up.

Mr. J. J. O'Connell: Your honor, if I might at this time ask to have a bond set and have a presentence investigation?

The Court: No, that will mean a stay and we have a rule against any stay of sentence here. Now is the time and I have thought about it and thought over it. I will say to the defendant he was indicted by the Grand Jury and charged with rape and subsequently brought into court and arraigned and pleaded not guilty to this charge and was tried by the jury and the jury found him guilty as charged in the indictment. Now have you anything to say or your counsel why sentence of the court should not be pronounced in accordance with the verdict of the jury.

Mr. J. J. O'Connell: Your honor, at this time I wonder [233] if I might say a few words in behalf of the defendant?

The Court: Yes, you may.

Whereupon counsel made a statement in behalf of the defendant.

The Court: The court is perfectly willing to recognize this recommendation for leniency. And under the circumstances is there anything further? Has the defendant anything he wants to say in his own behalf.

Defendant Guith: I still am not guilty; whether I am charged with being guilty or not I am not guilty.

The Court: Well the jury have found you guilty and it is the duty of the court to recognize that verdict and be governed accordingly, but I am going to take into consideration their recommendation for leniency. It is the judgment of the court and sentence of the court that the defendant be remanded to the custody of the Attorney General of the United States or his legally authorized representative to be confined in a penitentiary, or in an institution of the penitentiary type for the period of six years. That is all.

Whereupon court was adjourned at 5:25 p.m. on June 11, 1955.

[Endorsed]: Filed July 12, 1955.

[Endorsed]: No. 14848. United States Court of Appeals for the Ninth Circuit. Chester Guith, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana, Great Falls Division.

Filed: July 29, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14848

CHESTER GUITH, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS

The appellant in the above entitled cause, through his counsel of record, hereby adopts for his statement of points upon which he intends to rely upon this appeal, the Statement of Points to be relied upon on appeal, heretofore and on the 28th day of June, 1955, filed with the Clerk of the United States District Court for the District of Montana, Great Falls Division, and served upon counsel for the appellee, and certified by the said District Court

Clerk to the Clerk of the United States Court of Appeals for the Ninth Circuit, and hereby respectfully requests that said Statement of Points be allowed and filed pursuant to Rule 19 of this Court.

Dated this 12th day of September, 1955.

CHESTER GUITH,

Appellant,

/s/ By JERRY J. O'CONNELL,

Counsel of Record for the
Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 14, 1955. Paul P. O'Brien, Clerk.

IN THE

United States
Court of Appeals
for the Ninth Circuit

CHESTER GUTH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT, FOR THE
DISTRICT OF MONTANA

IN THE
United States
Court of Appeals
for the Ninth Circuit

CHESTER GUTH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM THE UNITED STATES
DISTRICT COURT, FOR THE
DISTRICT OF MONTANA

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SUMMARY OF THE QUESTIONS ON APPEAL

The questions presented by this appeal, as determined from and urged by Appellant's brief, are five in number, and they appear as follows:

First: Whether or not the trial court below had jurisdiction over the offense charged.

Second: Whether or not the trial court below erred in admitting Appellee's Exhibit No. 1 and denying objection to all of the testimony of the witness, Dr. King, on the grounds that no proper foundation had been laid to connect the said exhibit or said testimony with the Appellant herein.

Third: Whether or not the trial court below erred in refusing to admit Appellant's proposed Exhibit No. 4, which was a letter from a firm of attorneys which asked the Appellant to come to their office to discuss this case with them, it appearing that said exhibit was offered for the purpose of impeaching the testimony of Edward Go-bert, No. 2.

Fourth: Whether or not the trial court below erred in instructing the jury that Section 7, Subdivision 3, Title 18, U. S. C. A., applied to the case, in view of the fact that the Appellant held a deed to the land upon which the crime was committed, and that there was no reservation of any kind or nature on the part of the United States pertaining to said land.

Fifth: Whether or not the trial court below erred in admitting into evidence the testimony of the Federal Bureau of Investigation Special Agent Gene Fopp, relative to the admissions of the Appellant which the Appellant contends amount to a confession.

STATEMENT OF JURISDICTION

The Appellant herein, Chester Guith, was indicted by a Grand Jury, sitting in the United States District Court for the District of Montana, on the 9th day of November, 1954. The indictment contained a single count, which charged that on or about the 9th day of January, 1954, at the Guith ranch, approximately ten miles west of the City of Cut Bank, and at a place within the exterior boundaries of the Blackfeet Indian Reservation, being Indian country, and within the State and District of Montana, the Appellant, Chester Guith, did wilfully, unlawfully and feloniously have sexual intercourse with one Eleanora Gobert, a female Indian person of the age of fifteen (15) years, and not at said time the wife of said Appellant. The Appellant entered a plea of not guilty to the said indictment on the 9th day of June, 1955, in the United States District Court for the District of Montana, Great Falls Division, and the Appellant was tried by the said Court sitting with a jury on June 9, 10, and 11, 1955. On the 11th day of June, 1955, the jury returned a verdict finding the Appellant guilty in manner and form as charged in said indictment, and endorsed on said verdict the words "we recommend leniency." The said Court then pronounced judgment upon the said Appellant and sentenced the Appellant to serve six (6) years in a Federal penitentiary.

The Appellant appealed from the said judgment and sentence, giving his notice of appeal to this Court on June 13, 1955.

STATEMENT OF THE CASE

The Appellant is a white man, who resides on a ranch located on deeded land and lying within the exterior boundaries of the Blackfeet Indian Reservation.

The Prosecutrix is a female Indian ward of the Government of the age of fifteen (15) years, and she resides with her parents on a farm located on the Blackfeet Indian Reservation, approximately one-half mile from the farm of the Appellant. On January 9, 1954, the Prosecutrix, at the request of her father, placed a truck battery upon a sled at about noon of that day, and pulled the battery to the home of the Appellant for the purpose of having the battery charged. Upon arriving at the Appellant's ranch, she knocked on the door of the residence, and receiving no answer, she proceeded to look for the Appellant. She found the Appellant in a tool shed located on Appellant's ranch. Appellant advised that the battery-charger was in town being repaired, and proceeded to converse with the Prosecutrix. When the Prosecutrix attempted to leave, the Appellant grasped her and placed her upon the dirt floor of the tool shed where he proceeded to remove the jean trousers she was wearing. He then had an act of sexual intercourse with the Prosecutrix and afterwards admonished her that she should not tell anyone what they had done and also that she should go to the toilet so that she would not have a baby. The Prosecutrix then returned to her home and did not complain regarding the offense to anyone.

On the 2nd day of October, 1954, the Prosecutrix gave birth to a baby at the agency hospital, with Dr. King in

attendance. Dr. King advised the Federal Bureau of Investigation of the birth of the child to an unwed juvenile mother, and after that, the Prosecutrix, for the first time, made the admission that she had had sexual intercourse with the Appellant on the 9th day of January, 1954, at the Guith ranch. Her memory as to the date is clear because that particular January 9th happened to be the first Saturday after school had resumed after the Christmas vacation. The baby which the Prosecutrix had was considered by Dr. King, an expert witness, to be a full-term baby, and if anything, even longer than a full-term child. During pregnancy, the Prosecutrix carried the baby in a highly unusual manner, the head of the child being under the ribs of the Prosecutrix, and the feet and legs extending down into her pelvic regions; thus, the pregnancy was masked and the Prosecutrix was able to keep her secret.

The Appellant's defense to the charge was in the nature of an alibi that he had been in town and not at his ranch during the middle of the day of January 9, 1954. Attempts on the part of the Appellant to corroborate this alibi were weak and not convincing.

The question of jurisdiction and the basis therefor will appear clearly in the argument contained in this brief.

ARGUMENT

The Appellant makes five (5) specifications of error which will now be considered individually and in the order in which they are presented in Appellant's brief.

The Trial Court Below Properly Assumed Jurisdiction Of This Case.

A brief consideration of the law will make it appear conclusively that the court below had jurisdiction of this case.

Remembering that the Appellant is a white man and the Prosecutrix is an Indian and that the crime was committed on deeded land lying within the exterior boundaries of an Indian reservation, we should first examine Title 18, U. S. C. A., 1152, which reads as follows:

"Laws governing. Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively. June 25, 1948, c. 645, 62 Stat. 757."

As used in this statute, the words "sole and exclusive" do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws

which are extended by reason of this statute to operate on offenses committed in the Indian country. *Ex parte Wilson*, Arizona, 1891, 11 S. Ct. 870, 140 U. S. 575, 35 L. Ed. 513; *Ex parte Nowabbi* 1936, 61 P. 2d, 1139, 60 Okla., Cr. 111.

Next we should look at the definition of "Indian country," which is set out in Title 18 U. S. C. A., 1151, the pertinent portions of which appear as follows:

"... 'the term Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through reservations . . ."

Because of Statute Title 18 U. S. C. A., 1152, *supra*, we must determine whether or not there is a Federal law defining the crime of statutory rape which is applicable to offenses committed in any place within the "sole and exclusive" jurisdiction of the United States, and we find such a law in Title 18 U. S. C. A., 2032, which reads as follows:

"Carnal knowledge of female under 16. Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years. June 25, 1948, c. 645, 62 Stat. 795."

Thus, it is clear that a crime committed by a white man against a ward Indian within the Indian country is a

proper subject for Federal jurisdiction.

The Appellant contends that there is a lack of jurisdiction because the crime in the subject case was committed on fee patent land located on and within the reservation. This court has recognized Federal jurisdiction of subject case in the case of *Williams v. United States*, 215 F. 2d., 1, wherein it lays down the legal principle that there shall be no failure of Federal jurisdiction because of the fee patent nature of the land upon which the crime was committed, so long as the crime was committed on land which lies within the limits of the Indian reservation.

The court below was correct in charging the jury that the facts of the case vested the court with jurisdiction.

The Court Was Correct In Admitting the X-Ray Showing the Prosecutrix to be Pregnant and the Testimony of Dr. King Relative to the X-Ray, the Pregnancy and the Delivery of the Child.

The X-ray was made by Dr. King on the 2nd day of October, 1954, (Tr. 70), which was the same day that Dr. King attended the birth of the baby shown by the X-ray. (Tr. 68.) Dr. King testified that the baby which he delivered and which was shown in the X-ray could have been the result of an act of sexual intercourse which occurred on the 9th day of January, 1954. (Tr. 68, 69.)

This evidence is extremely important in corroborating the testimony of Eleanora Gobert that she had had sexual intercourse with the Appellant on the 9th day of January, 1954. (Tr. 29, 30, 31.)

The Prosecutrix testified that she had a baby on October 2, 1954, which was delivered by Dr. King. (Tr. 32, 33.) She also testified that she had never had sexual intercourse with anyone other than the Appellant. (Tr. 33, 34.)

Thus, if the Prosecutrix had sexual intercourse on January 9, 1954, with Appellant and had never at any time had sexual intercourse with any man other than the Appellant, it appears clearly that the pregnancy is the result of an act of sexual intercourse with the Appellant. The X-ray which is Appellee's Exhibit No. 1, and the testimony of Dr. King relative to the delivery of the baby and to the period of gestation required for the birth of a human baby, are of great value in corroborating the testimony of the Prosecutrix.

The Court Committed No Error in Refusing to Admit Into Evidence A Letter Received by Appellant From An Attorney, for the Purpose of Impeaching the Testimony of Witness Edward Gobert, No. 2.

Appellant testified that he received Appellant's proposed Exhibit No. 4, a letter, in the regular course of the mail; and that the letter was from Mr. Aronow, a Shelby attorney, and that as a result of receiving the letter the Appellant went to see Mr. Aronow. Appellant further contends that the purpose of this exhibit was to impeach the testimony of witness Edward Gobert, No. 2.

This presents no problem in that no proper foundation was laid for such an impeachment. Edward Gobert, No.

2 did not testify on either direct examination or cross-examination that any such letter was or was not written, or that it was or was not received by the Appellant, and he did not testify as to the contents of any such letter or that he ever knew anything about such a letter.

It is a well settled rule of law that there can be no impeachment of a witness until the witness has testified with some particularity as to the facts which constitute the basis of the impeachment. *Bearman v. Prudential Insurance Company of America*, 186 F. 2d, 662. According to the *Bearman* case, *supra*, the letter could not have been received in evidence as proof of the facts therein stated, and further that it could be introduced in evidence only to impeach the writer of the letter or a person denying the receipt or existence of such a letter.

In the absence of any proper foundation, it is obvious that the letter could not be used to impeach the testimony of Edward Gobert, No. 2.

The Court Below Committed No Error In Instructing the Jury That Section 7, Subdivision 3, Title 18, U. S. C. A., Applied to This Case.

In order to properly consider this question, we must read the court's instruction relative to jurisdiction, (Tr. 186, 187, 188), as a whole, and it appears as follows:

"Now before I overlook it it has been stated here by counsel that proof has not been submitted that this is within the Indian country. And I want to disabuse your minds of that situation right at this time. When you started there was testimony in this case that the Guith ranch is within the exterior boundaries of the

Blackfeet Indian Reservation, and that is sufficient, so I need not give that question further consideration.

Now the law, I should call your attention, of course, to the law upon which this information is based. I am reading from Section 1152 of the United States Code Annotated, Title 18:

‘Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country’.

And from Section 1151:

‘Indian country defined. Except as otherwise provided in sections 1154 and 1156 of this title, the term “Indian country,” as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, * * *.’

Now the federal statute upon which this indictment rests is found in Section 2032 of Title 18, United States Codes Annotated, and it reads, as follows:

‘Whoever, within the special maritime and territorial jurisdiction of the United States, carnally knows any female, not his wife, who has not attained the age of sixteen years, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, be imprisoned not more than thirty years.’

Within the territorial jurisdiction of the United States, and that requires some definition and that is found in Title 18, United States Codes Annotated, Section 7, subdivision (3) which illustrates the mean-

ing of that, what I have just read to you. Subdivision (3):

‘Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.’

You will note then that would be any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof, which fits this case precisely.”

Then, according to the lower court’s instruction, we must apply Title 18 U. S. C. A., 1152, *supra*, and Title 18 U. S. C. A., 1151, *supra*, which unequivocally direct us to Title 18 U. S. C. A., 2032, *supra*, as the law applicable to the facts of this case. Then, it appears that the law operates in effect to lift from the carnal knowledge statute, 18 U. S. C. A., 2032, *supra*, the words “within the special maritime and territorial jurisdiction of the United States” and to substitute in it’s stead, the words “Indian country” so that Title 18, U. S. C. A., 2032, *supra*, when read in the light of the definition of Indian country and Title 18 U. S. C. A., 1152, *supra*, would read as follows:

“Whoever, *within the Indian Country*, carnally knows any female, not his wife, who has not attained the age of sixteen years shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense, by imprisonment not more than thirty years.”

The Court, in reading to the jury Title 18 U. S. C. A., Section 7, (3), which reads as follows:

“The term ‘special maritime and territorial jurisdiction of the United States’ as used in this Title, includes:

(3) Any lands reserved or acquired for the use of the United States and under the exclusive or concurrent jurisdiction thereof, . . .”

was obviously stating to the jury the Congressional authority for the enactment of Title 18 U. S. C. A., 1151, supra, which defines Indian Country and Title 18 U. S. C. A., 1152, supra, which advises us which laws shall apply to crimes committed in the Indian country by a white man against an Indian person.

The Admission of the Testimony of Gene Fopp to the Effect That Appellant Admitted Having Sexual Intercourse with the Prosecutrix on Several Occasions Was Not Error in that the Testimony Was Admitted for the Purpose of Impeaching the Appellant as a Witness.

The Appellant opened the door for impeachment when he took the stand and on his direct examination (Tr. 144, 145) testified as follows:

“Q. (By Mr. J. J. O’Connell): Now she went on further and said that after this alleged occurrence on January 9th, 1954, that on three or four other occasions within a period of three or four weeks after the occurrence on January 9th, 1954, that you again had sexual intercourse with her, is that testimony true or false.

A. Very false.

Q. Did you have sexual intercourse with her on those three or four occasions?

A. No."

A foundation for the impeachment of the Appellant as a witness was laid on cross examination of the Appellant by the following testimony (Tr. 156, 157):

"Q. By Mr. J. J. O'Connell (Should read M. J. O'Connell): I will ask you, Mr. Guith, whether or not on the 12th day of October, 1954, you told F. B. I. Agent Gene Fopp that you had sexual intercourse?

A. I didn't.

Q. With Eleanora Gobert?

A. I did not.

Q. I ask you now if you deny that you told Special Agent Gene Fopp on October 12th, 1954, that you had sexual intercourse with Eleanora Gobert several times?

A. I never told him that.

Q. Are you denying it?

A. I am denying it."

Finally, the Appellant was impeached as a witness when, on rebuttal, Federal Bureau of Investigation Special Agent Gene Fopp on his direct examination stated as follows (Tr. 163, 164, 165, 166):

"Q. (By Mr. M. O'Connell): Mr. Fopp, when was the first time that you talked to Chester Guith in connection with this case?

A. October 12, 1954.

Q. October 12, 1954?

A. Yes, sir.

Q. And where did you talk to him?

A. On the field a short distance from his house, I would say possibly one-quarter of a mile near the Gunsight Elevator about a mile off of Highway No. 2 north.

Q. Who was present at that conversation?

A. He and I were just present at the conversation; there were other workmen a short distance from the automobile but I removed him some more personally. I asked him to come and speak to me in confidence and we came to my automobile and I spoke to him there.

Q. What time of the day was it?

A. I started at 11:50 a. m. when I arrived.

Q. How long did you continue to talk?

A. By my notes I concluded it at 12:30.

Q. Could you tell us what that conversation was?

A. Yes. I introduced myself to him and displayed my credentials so he would know who I was and advised him I came to talk with him concerning a serious matter; that the allegation had been made he was the father of a child born by a juvenile girl therefore it would be automatically statutory rape. I advised him that he need not say anything to me at all; that he was entitled to an attorney, and that anything that he did tell me could be used in a court of law against him. I then informed him of the

identity of the girl who had the child and the fact that she had named him as the person having had intercourse with her, the result of which was the child in question born October 2, 1954.

Q. Just a moment now. Was there any, did you notice any physical change in the defendant when you first announced what the nature of the charge was?

A. Yes, sir.

Q. What was the change?

A. Well he became quite concerned and blood drained from his face and I suggested he sit down in the car. We continued our conversation either on the side of the car or inside of the car.

Q. And what was the conversation?

Mr. J. J. O'Connell: Now just a minute. I want to object to the general broad character of this question and the danger of incompetent and inadmissible evidence coming in without any opportunity to object and to keep it from the jury and I think the question should be in detail.

Mr. M. O'Connell: Just a moment. I withdraw the last question.

Q. (By Mr. M. O'Connell): Tell me during the course of that conversation did Chester Guith admit or did he not admit having intercourse with Eleanora Gobert?

A. He admitted.

Mr. J. J. O'Connell: Now just a minute. Your honor, to which we object on the ground that this

actually amounts to confession rather than admission and there has been no proper foundation laid for any admission of a confession.

The Court: Overrule the objection.

A. He admitted having had intercourse with her.

Q. On one or more occasions?

A. On three or four occasions.

Mr. M. O'Connell: You may cross examine."

Thus, the impeachment of the Appellant as a witness was completed.

It is well established law that a witness may be impeached by the introduction of prior inconsistent statements. A recent and clear statement of this rule may be found in the case of *United States v. Schneiderman*, 106 F. S. 906, 929, wherein the Court said:

"A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements that are inconsistent with the witness' present testimony."

Then, it immediately appears that this testimony was properly admitted for the purpose of impeachment.

It is difficult to conceive how anyone could consider this testimony to amount to a confession in view of the fact that the Appellant merely admitted having had sexual intercourse with the Prosecutrix on three or four occasions, and did not testify as to any dates, places, times or circumstances of the acts.

CONCLUSION

For the reasons stated in the argument, we believe that this Court will agree with us that the Appellant has failed to specify any prejudicial or reversible error on the part of the court below in his presentation of the case to this Court.

Respectfully submitted,

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IN THE
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Court of Appeals
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CHESTER GUTH

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPELLANT'S BRIEF

**APPEAL FROM THE UNITED STATES
DISTRICT COURT, FOR THE
DISTRICT OF MONTANA**

FILED

Filed, 1955

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..... Clerk

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STATEMENT OF JURISDICTION

The appellant herein, Chester Guith, was indicated by a Grand Jury in the United States District Court for the District of Montana, Great Falls Division. The indictment, in one count, was based on 18 U.S.C. 1152 (R.C.M. 94-4101). It charged that the appellant on the 9th day of January, 1954, at the Guith Ranch and at a place within the exterior boundaries of the Black-foot Indian Reservation, being Indian Country, and within the State and District of Montana, did wilfully, unlawfully, and feloniously have sexual intercourse with one, Eleanora Gobert, a female Indian person, of the age of 15 years and not at said time the appellant's wife. To the indictment the defendant entered a plea of "Not Guilty" and was tried by the Court sitting with a jury on June 9th, 10th and 11th, 1955. The jury returned a verdict of "Guilty as Charged" and the appellant was sentenced to serve six years in the Federal Penitentiary.

From the judgment of conviction and sentence, the appellant gave due notice of appeal to this Court on the 13th day of June, 1955.

STATEMENT OF THE CASE

As set forth herein above, the appellant herein was convicted of an offense in the indictment which attempted to charge the defendant under Title 18 U.S. C.A. 1152 by setting forth the crime of statutory rape as provided in Section 94-4101 R.C.M. 1947. The ap-

pellant is a white man while his alleged victim was a member of the Blackfeet Indian tribe.

Upon the settlement of the instructions, the matter having been previously raised by counsel for appellant, the learned Judge in the Court below first instructed the jury, (TR. 187) that the information was based on Section 1152 U.S.C.A., Title 18 and then defined Indian country as set forth in Section 1151 of the same title. The Court below then went on and instructed the jury that the Federal statute upon which the indictment rests is found in Section 2032 U.S.C.A., Title 18, the Federal Carnal Knowledge Act, (TR 188), and defined territorial jurisdiction of the United States as that term is contained in Title 18, U.S.C.A. Section 7, Subdivision 3, and stated that such definition "fits this case precisely". The principal question involved on appeal arises therefore on the question of jurisdiction of the Court below.

Appellant contends that by virtue of the instruction of the Court below, he was actually charged with violation of the Federal Carnal Knowledge Act and not under the Indian Rape Law as originally set out in the indictment. We contend that the determination of the question of jurisdiction is based upon whether or not the alleged crime actually took place within the special maritime and territorial jurisdiction of the United States and not merely the question of whether or not the place of said offense was Indian country as provided in Sections 1151, 1152, U.S.C.A. Title 18.

Minor questions involved in this appeal concern

the admission of certain evidence and the denial of appellant's objection to such evidence involving appellee's Exhibit No. 1, which appellant contends was admitted without proper foundation, (TR 71) and in the refusal of the court to admit certain evidence offered by the appellant, (TR. 149, 150) involving an attempt by the complaining witness' parents to extort money from the appellant.

There is also the additional question of prejudice to the defendant of permitting the trial of the case to continue under one Federal statute and then in the instruction to the jury informing them that the indictment actually rested upon another statute, so that the record made by the defendant below is complicated and harmed by this fact.

SPECIFICATION OF ERRORS

From the judgment of conviction and sentence below, the appellant appeals and specifies as error:

1. The trial court below had no jurisdiction over the offense charged.

2. The court below erred in admitting appellee's Exhibit No. 1 and denying appellant's objection to all of the testimony of the witness King in that no proper foundation had been laid to connect the said Exhibit or said evidence with the appellant herein, all of which evidence was prejudicial to the appellant.

3. The court below erred in refusing to admit appellant's proposed Exhibit No. 4.

4. The trial court erred in instructing the jury that

Section 7, Subdivision 3, Title 18, U.S.C.A. applied to this case in view of the fact that the evidence shows that the Guith Ranch upon which the alleged crime was committed was held by deed by the appellant herein without reservation of any kind or nature by the United States; so that such land was not reserved or acquired by the United States or under the exclusive or concurrent jurisdiction thereof, or in any other manner under said subdivision of said statute.

5. The court below erred in admitting the testimony of the witness Fopp relative to the alleged confession of the appellant, there being no proper foundation laid for the admission hereof, in that there was no showing that no threat or inducement had been made to the appellant. Plaintiff abandons Points 1, 4, 5, 6, and 11, set forth in his statement of points, (TR. 9, 10.)

ARGUMENT

The principal point involved in this appeal is the question of the jurisdiction of the court below which involves appellant's specification of error No. 1. This matter has been before this Court so many times that one would feel that the law of jurisdiction of these cases was clearly settled. Counsel for appellant is convinced that the cases decided leave much to be determined as far as jurisdiction is concerned. The appellant and defendant below is a white man, while the female involved is an Indian. The place where the alleged offense occurred is definitely within the

boundaries of the Blackfeet Indian reservation in the State of Montana.

This case becomes complicated by the fact that the indictment was brought under Title 18 U.S.C.A. 1152 while in its instructions the Court below actually said the case rested on Title 18 U.S.C.A. 2032 the Federal Carnal Knowledge Law. It is our contention that it then became a question not whether Indian country was involved precisely but whether or not the Guith Ranch was within the special territorial jurisdiction of the United States. We contend that because the evidence (TR. 142) definitely shows that the Guith Ranch was deeded to the appellant in fee by a tax deed granted by Glacier County, State of Montana without any reservation by the United States, that the United States definitely had no territorial jurisdiction of the place involved as required by Section 2032 Title 18 U.S.C.A. and Subdivision 3, Section 7 of the same title.

By act of June 2, 1924, Chapter 231, 43 Stat. 252, which is set forth in the historical note to Title 25, Chapter Nine, Section 331, dealing with allotments on Indian Reservations, the Statute provides:

“The allotments of Blackfeet Indians designated as Homesteads under Section 10 of the Act of June 30, 1919, imposing restrictions on alienation, shall after the death of the original allottee, be subject to partition, sale, issuance of patents in fee, or any other disposition authorized by existing law, relating to Indian allotments.”

In this case, the evidence shows (TR. 142) that the

Guith Ranch, which was originally land on the Black-foot Indian Reservation, had been disposed to the defendant by tax deed from Glacier County, Montana, and was no longer within or subject to the reservation and jurisdiction of the United States.

Originally it was considered by the Supreme Court of the United States in the cases of *U.S. vs McBratney*, 104 U.S. 621, and *Draper vs U.S.*, 164 U.S. 240, that the organization and admission of states into the Union qualified the former federal jurisdiction over Indian country included therein, by withdrawing from the United States the control of offenses committed by white people. However, in *Donnelly vs U.S.*, 228 U.S. 820, the United States Supreme Court held that the killing of an Indian by a person not of Indian blood, was cognizable in the Federal Courts under the Federal Statute which extended to Indian Country the so-called Major Crimes Act. We think the case here involved is definitely distinguished from the *Donnelly* case in three respects: First, the Federal Carnal Knowledge Act is not included in the so-called Ten Major Crimes Act, *U.S. vs Jacobs*, 113 F. Supp. 203, *Williams vs U.S.*, 148 F. (2) 960, decided by this Court in 1945; Second, the *Donnelly* case refers strictly to Federal jurisdiction in **Indian Country** while the Court below in this case specifically placed the offense under the Federal Carnal Knowledge Act, which requires an offense to be committed within the special territorial limits of the United States in order to support federal jurisdiction; third, the *Donnelly*

case specifically considers the question whether the bed of the Klamath River was included within the Indian Reservation and further, considered the question of whether or not a certain placer mining claim was actually owned by the claimants or not. The Court in the Donnelly case definitely decided that the United States, as riparian owner, under the laws of the State of California, had title to the Klamath river bed and that the evidence in the record was too meager to determine whether valid rights had attached to the placer mining claim in favor of the claimants. We think, therefore, the plain inference of the Donnelly case is that if the title to the river bed, or the placer mining claim, belonged to someone other than the United States the Court would have held that the United States did not have jurisdiction. Here in this case, we must point out again that the appellant Guith had full title to the land on which the alleged offense was committed, and the United States had no jurisdiction. In the Donnelly case it should also be pointed out that there was no contention that the defendant was charged with a crime committed on land which he owned outright and subject to no reservation or jurisdiction by the United States.

In conclusion we assert that the federal court had no jurisdiction of this case and the judgment below should be reversed.

All of the argument set forth herein above is advanced by appellant in behalf of his specification of error number four, which involves the instruction of

the court below to the jury on the question of jurisdiction and which in totidem verbis was as follows: (TR. 188)

“Within the territorial jurisdiction of the United States, and that requires some definition and that is found in Title 18, United States Codes Annotated, Section 7, Subdivision (3) which illustrates the meaning of that, what I have just read to you. Subdivision (3): “Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock yard, or other needful building.”

You will note then that will be any lands reserved or acquired for use of the United States and under the exclusive or concurrent jurisdiction thereof, which fits this case precisely.”

To this instruction the appellant duly excepted (Tr. 201) on the grounds that the Guith Ranch, where the alleged offense was allegedly committed, was not within the territorial jurisdiction of the United States, that the United States had reserved no right in said Guith Ranch, and that the evidence clearly showed that the said Guith Ranch was owned by the defendant by virtue of a tax deed granted by Glacier County, Montana.

Appellant's specification of error number two charges that the trial court erred in admitting appellee's Exhibit No. 1, which was an X-Ray showing a fully developed baby within the womb of the alleged victim, and also in denying appellant's objection to

all of the testimony of the witness, Doctor King, (Tr. 71). Appellant objected on the ground that there had been no connection made by this testimony and exhibit with the defendant below. This evidence was certainly highly prejudicial to the appellant and certainly served to inflame the jury against him. The court overruled the objection for the present. The witness then went on and testified and in that testimony (Tr. 72) actually gave evidence that he had no information relative to the paternity of the child. There was therefor no connection tying the evidence and the exhibit to the appellant. Wigmore, Underhill, Greenleaf, and Nichols all point out that it is elementary that before prejudicial evidence of the nature offered here can be admitted it must be connected with the defendant, and this certainly was not done here.

In behalf of his specification of error number three the appellant advances the argument that the court below erred in refusing appellant's proposed exhibit number four (Tr. 149, 150). This was a letter from a firm of attorneys which asked the appellant to come to their office and discuss this case with them. It was offered for the purpose of impeaching the testimony of Edward Gobert, No. 2 (Tr. 83, 84) in which Gobert had denied that there was any discussion of getting money from the appellant, and hiring an attorney for that purpose. We think the exhibit was clearly admissible for that purpose. McKelvey on Evidence, Sec. 207, P. 388.

Arguing appellant's specification of error number

five, we contend that the court below erred in admitting the testimony of the witness Fopp (Tr. 165) wherein said witness testified that the appellant had admitted having intercourse with the prosecutrix. This we contend was not an admission but a confession, if true, and was subject to the strict rules of foundation for admission of a confession. There was no foundation laid as to the voluntary character of the confession and certainly no foundation as to whether or not any threat or inducement was made to the appellant to procure said confession. We do not want to belabor the court with what has been said on the matter of the admissibility of confessions without proper foundations in hundreds of cases decided by this court. McKelvey on Evidence, Sec. 110, P. 224, Wilson vs U.S., 162 U.S. 613, Greenletf, Evidence, Sec. 214, Note 2.

CONCLUSION

We think the errors of the Court below as set forth hereinabove are prejudicial and reversible, and we believe that this court can only come to the conclusion that the judgment of conviction below should be reversed.

Respectfully Submitted,

JERRY J. O'CONNELL,
Attorney for Appellant.



IN THE
United States
Court of Appeals
for the Ninth Circuit

CHESTER GUTH

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING

JOHN M. McCARVEL,
305 Barber-Lydiard Bldg.
Great Falls, Montana
Attorney for Appellant

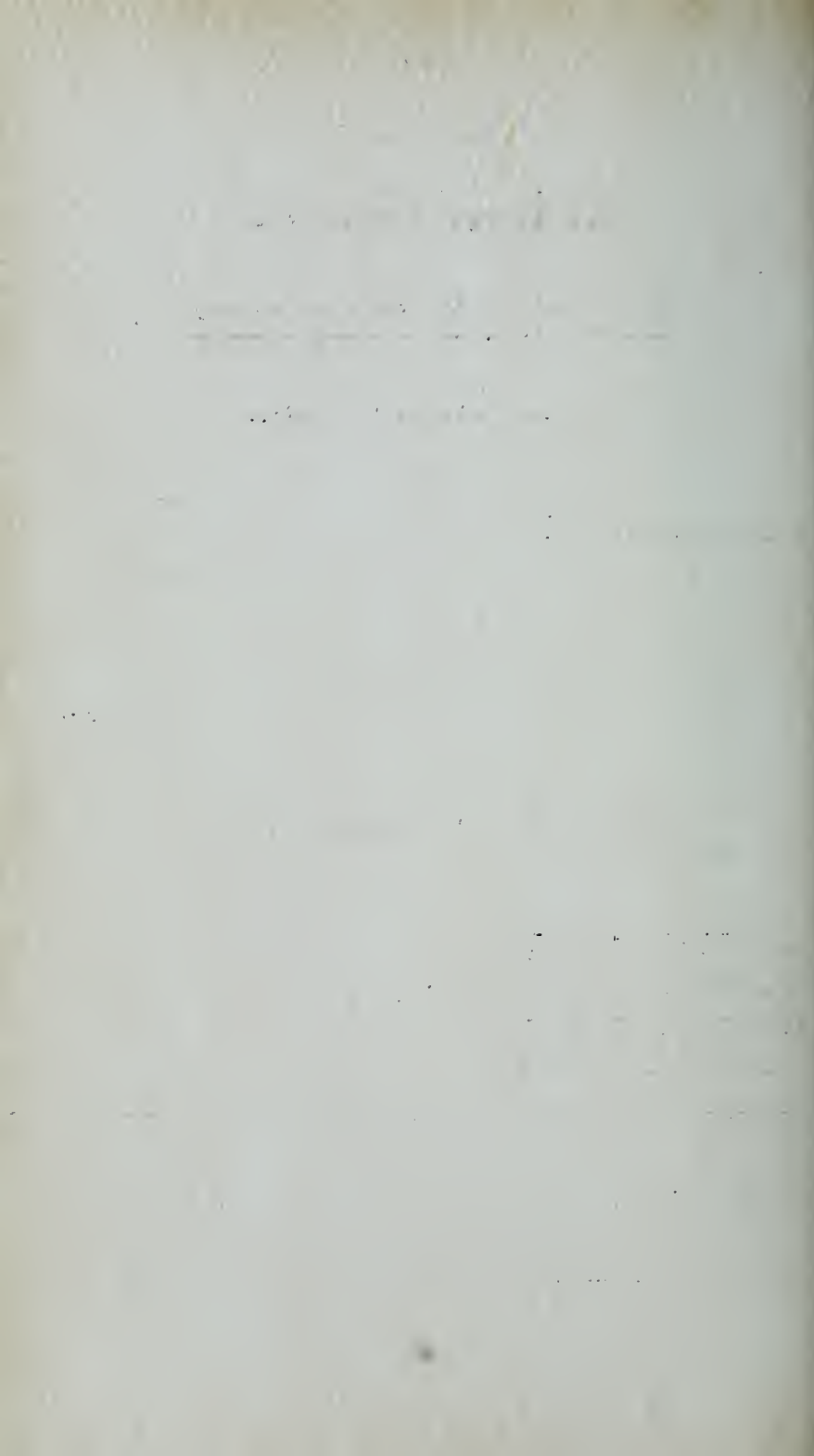
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..... **PAUL P. O'BRIEN, CLERK**

Clerk





IN THE
United States
Court of Appeals
for the Ninth Circuit

CHESTER GUTH

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

PETITION FOR REHEARING

TO THE HONORABLE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT, AND
TO THE JUDGES THEREOF:

Appellant respectfully petitions this Court for a rehearing of the decision filed in this matter on February 14, 1956. Appellant urges that this petition be granted for the following principal reasons:

(1) The Court erred in grounding its decision as to whether or not there was Federal jurisdiction on

an admission of appellant's counsel in oral argument that the land in question is located in "Indian Country" within the meaning of 18 U.S.C. Section 1151.

Contrary to all the objections of record in the District Court and to the Specifications of Error in counsel's printed brief and argument therein, this Court conferred jurisdiction on the lower court by an erroneous concession of counsel in oral argument on appeal. In this connection appellant calls to the court's attention that counsel of record for defendant in the lower Court was Jerry J. O'Connell, who died on January 16, 1956, of a heart attack. He was buried on January 19, 1956. The date set for hearing of argument in this Court was February 7, 1956. Counsel who appeared before this Court on that date was the law partner of the deceased prior counsel, and because of the tremendous work-load upon him he was unable to adequately prepare himself for the argument or to adequately acquaint himself with the record in the lower court and the law on which the grounds for appeal was based. Particularly, counsel who argued the case on appeal assumed that the record showed that the land on which the offense is alleged to have occurred was land on which a patent had at one time been issued. The record is completely bare of any such evidence. The only thing the record shows is that the land was acquired by tax deed from Glacier County, Montana, without any reservation of any Federal jurisdiction over the land.

Certainly before Federal Jurisdiction can exist the

facts upon which it is based must be proven. To confer Federal jurisdiction by admission of inept, unprepared, nay ignorant counsel in oral argument on appeal only seems to emphasize in the mind of the appellant the want of jurisdiction. It constitutes an avoidance of a legal question that must be determined sooner or later, and appellant would prefer it now.

It is respectfully submitted that before the Federal jurisdiction could be established in this case that the record must affirmatively show that the land on which the alleged offense occurred was land on which a patent had issued. The only evidence in the record is that the defendant owns the land by tax title from Glacier County, Montana, without any reservation whatever in the United States Government.

For the foregoing reason it is respectfully urged that the Court grant this Petition for Rehearing.

JOHN M. McCARVEL

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that he has prepared this Petition for Rehearing and that the grounds therein stated are in his opinion well founded and that this Petition is not filed for reason of delay.

JOHN M. McCARVEL,

305 Barber-Lydiard Bldg.

Great Falls, Montana

Attorney for Appellant



No. 14,849

IN THE

United States Court of Appeals
For the Ninth Circuit

FLOYD J. OSBORN,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

422 Post Office Building,

7th and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.

FILE

NOV -8 1955



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No. 14,849

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FLOYD J. OSBORN,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

This Court has jurisdiction of this case under Sections 2243, 2244 and 2253 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant petitioned for a writ of habeas corpus in the Court below alleging (1) that the prosecution knowingly used perjured testimony, (2) that the pre-trial investigating officer did not act in accordance with Article of War 70, Title 10 United States Code Section 1542, (3) that petitioner's counsel was not allowed sufficient time to prepare his defense, (4) that es-

stantial witnesses were transferred so they would not be available to petitioner, and (5) that the offense of which he was convicted was not murder. Appellant did not allege that he had exhausted his remedies under Article of War 53.

United States District Judge Louis E. Goodman denied the petition on the ground that the matters complained of had been passed on by a judge of another District Court. Leave to appeal in forma pauperis was denied on the ground that the appeal was not taken in good faith. Appeal was then taken to this Court.

OPINION BELOW.

“ORDER DENYING PETITION FOR HABEAS CORPUS

“Petitioner, who is confined at Alcatraz Penitentiary pursuant to a judgment and sentence of a general court-martial, seeks a writ of habeas corpus on the following grounds:

(1) that the prosecution knowingly used perjured testimony against him;

(2) that essential witnesses for his defense were wilfully transferred so that they would be unavailable to petitioner.

(3) that the pre-trial Investigating Officer did not conduct the impartial investigation required by the former 70th Article of War;

(4) that counsel for petitioner was denied sufficient time to prepare the defense.

"A previous application to this court for the writ was denied on June 16, 1954, Civil No. 33432. This prior application sought relief on a ground not asserted in the present petition. However, included in the file on the prior proceeding is a certified copy of an order of the United States District Court for the District of Kansas discharging a writ of habeas corpus granted petitioner while he was confined at Leavenworth Penitentiary. It appears from this order that the Kansas court conducted a full hearing respecting the regularity and propriety of petitioner's court martial.

"The Kansas court states in the order that:

'It is petitioner's contention that he was not given a fair and impartial trial, that evidence favorable to him was criminally repressed by the prosecution, and that he was convicted by means of false testimony obtained through coercion and duress from witnesses who formerly had been held as suspects in return for absolution.

'On behalf of respondent the complete record of the court-martial trial was introduced and received in evidence, and from all of the evidence, including the testimony of the petitioner, the court makes the following finding.

'The court further finds that the charges were properly sworn to, investigated by a military investigating officer and referred for trial before a general court-martial by the Commanding General of the Fifth Army.

‘The court further finds from the evidence that the petitioner was not convicted through the use of false testimony obtained through coercion or duress or by evidence unlawfully obtained or used by prosecuting authorities; on the contrary, the court finds that petitioner was convicted by a general court-martial, legally convened, at a trial in which he was not denied any of his legal or constitutional rights; that the trial was proper and regular in all respects and that the sentence imposed, being within the limits authorized by law for the offense of which the petitioner was found guilty, is valid and binding.’

“Although petitioner asserts in the present petition that the questions raised before the Kansas court were dissimilar to the contentions raised here, he sets forth no facts which would indicate that they were in fact any different, or if so, any reasons why such questions were not or could not have been presented to the Kansas court.

“Dated: January 6, 1955.

“LOUIS E. GOODMAN,

“United States District Judge.”

QUESTIONS PRESENTED.

1. Did the petition below present any new ground for decision not theretofore determined by the Kansas court?

2. Has appellant exhausted his administrative remedies?

3. Are any of the so-called "new grounds" urged by appellant sufficient as a matter of law to justify his release?

ARGUMENT.

Appellant argues that three grounds are urged in the present proceeding which were not raised in the Kansas court: (1) that the pre-trial investigating officer acted contrary to law, (2) that counsel had not sufficient time to prepare his defense, and (3) that appellant's crime did not constitute a violation of the 92nd Article of War.

Appellant's allegations with respect to the pre-trial investigation are argumentative, and vague, and utterly fail to disclose any basis upon which it could be determined that an impartial investigation was in fact not made. The United States Supreme Court, however, in the case of *Humphrey v. Smith* (1949), 336 U.S. 695, held that an entire lack of a pre-trial investigation would not affect the jurisdiction of a court martial so as to be grounds for the issuance of a writ of habeas corpus. Furthermore, as appears in Judge Goodman's opinion, the Kansas court specifically found after a full hearing that the court martial charges were properly investigated by a military investigative officer. It was within the Court's discretion to refuse to inquire into the matter further.

Appellant's claim that his counsel did not have adequate time to prepare his defense is even more vague. All appellant has to say concerning this contention is

that counsel for the defense were allowed "but a matter of a few hours to prepare their defense." How this Court, or any court, can be expected to decide whether sufficient time was allowed without an accurate statement of what time was in fact given to defense counsel is hard to determine. No statement is made concerning what motions, if any, were made by defense counsel. The scope of review is more narrow in military cases than in other habeas corpus proceedings. The Supreme Court has held that civil review does not extend to such matters as the competence of defense counsel. *Hiatt v. Brown* (1950), 339 U.S. 103.

Furthermore, it does not appear that appellant ever exhausted his administrative remedies under Article of War 53. He had an opportunity to have his contention passed on by the military courts. From the record it does not appear that he availed himself of that opportunity. In *Gusik v. Schilder* (1950), 340 U.S. 128, the Supreme Court held that unless a showing is made that this remedy is exhausted, there is no jurisdiction for a civil court to inquire into the validity of a military conviction. See also *Hunter v. Beets* (C.A. 10, 1950), 180 F.2d 101; *McMahan v. Hunter* (C.A. 10, 1950), 179 F.2d 661; *Simmons v. Hunter* (C.A. 10, 1950), 179 F.2d 664. This Court has recently come to the same conclusion in the case of *Kethel Osborne v. Swope*, No. 14,697, decided October 27, 1955. The Kansas court, after hearing testimony by appellant, came to the conclusion that appellant was denied none "of his legal or constitutional rights; that the trial was proper and regular in all respects."

This ground, if it be new at all, could not have facilitated appellant's release, and the court below need not have issued a writ of habeas corpus on the basis of it.

Appellant's third claim of a new ground involves the construction of Article of War 92. The factual allegations urged in support of this ground amount to no more than a rehash of the evidence at the trial. The civil courts do not have supervisory or corrective power over the proceedings of a court martial. "The correction of any error it may have committed is for the military authorities which are alone authorized to review its decision." *Hiatt v. Brown*, 339 U.S. 103 (1950), at 111.

The Supreme Court has held in *Burns v. Wilson* (1953), 346 U.S. 137, that the burden was on the petitioners to show that their military review was illegally inadequate to resolve their claims. Here appellant has made no showing that his military review was inadequate or that he in fact even applied for relief through military channels. The court below was, therefore, without jurisdiction to entertain his petition. The judgment below should be affirmed.

Dated, San Francisco, California,
November 7, 1955.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.



No. 14852

United States
Court of Appeals
for the Ninth Circuit

C. A. SWANSON & SONS POULTRY COM-
PANY,

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for
the Manuel Delatorre dba R & M Egg Farms,
Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

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No. 14852

United States
Court of Appeals
for the Ninth Circuit

C. A. SWANSON & SONS POULTRY COM-
PANY,

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for
the Manuel Delatorre dba R & M Egg Farms,
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Transcript of Record

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

NORMAN A. OBRAND,
408 S. Spring St.,
Los Angeles 13, Calif.

For Appellee:

CRAIG, WELLER & LAUGHARN,
THOMAS A. TOBIN,
FRANK WELLER,
817-111 W. 7th St.,
Los Angeles 14, Calif.



In the District Court of the United States for the
Southern District of California, Central Division
No. 17388-BH

WILLIAM A. WYLIE, Trustee in Bankruptcy for
MANUEL DELATORRE, dba R & M EGG
FARMS, Bankrupt,

Plaintiff,

vs.

C. A. SWANSON & SONS POULTRY CO., a
Corporation; DOE ONE, DOE TWO, DOE
THREE, DOE FOUR, DOE FIVE, DOE
SIX, DOE SEVEN, DOE EIGHT and DOE
NINE,

Defendants.

COMPLAINT TO RECOVER VOIDABLE
PREFERENCE UNDER THE PROVI-
SIONS OF BANKRUPTCY ACT SECTION
60b

Plaintiff Complains of Defendants, and Each of
Them, and for Cause of Action Alleges as
Follows:

I.

That the true names or capacities, either individ-
ual, corporate, associate, or otherwise, of defendants
Doe One, Doe Two, Doe Three, Doe Four, Doe Five,
Doe Six, Doe Seven, Doe Eight and Doe Nine are
unknown to the Plaintiff herein, who, therefore
sues said defendants by such fictitious names, and
will ask leave to amend his complaint to show their
true names and capacities when said name has been

ascertained. Each of the said defendants so sued have, or claims to have, some interest in or to the within matter. [2*]

II.

That the bankruptcy proceedings of Manuel Delatorre, dba R & M Egg Farms, were commenced by the filing of an involuntary petition in bankruptcy on August 20, 1953, in the United States District Court for the Southern District of California, Central Division; that the said Manuel Delatorre was adjudicated a bankrupt on the said involuntary petition on September 9, 1953.

III.

That William A. Wylie, the Plaintiff herein, was on December 14, 1953, at a First Meeting of Creditors, appointed trustee in the bankruptcy estate of Manuel Delatorre, and immediately thereupon qualified and has at all times thereafter, and does now, act as trustee in the said bankruptcy proceedings.

IV.

That on May 29, 1953, and within four months of the commencement of the within bankruptcy proceedings, the bankrupt, Manuel Delatorre, was indebted to the defendants, and each of them, in the sum of \$16,830.78 for merchandise previously sold and delivered to the bankrupt on open account.

V.

That beginning on June 5, 1953, the bankrupt made seven payments to the defendants, and each

of them herein, to a total sum of \$12,267.05; that all of the said payments, and each of them, were made within four months of the commencement of the within bankruptcy proceedings.

VI.

That on May 29, 1953, and at all times thereafter, the bankrupt, Manuel Delatorre, was insolvent.

VII.

That on May 29, 1953, and at all times thereafter, defendants, and each of them herein, had reasonable cause to believe that the bankrupt, Manuel Delatorre, was insolvent. [3]

VIII.

That the effect of the said delivery and payment will be to enable the defendants, and each of them, to obtain a greater percentage of their debts owing from the bankrupt than other creditors of the same class.

Wherefore, Plaintiff demands judgment against the defendants, and each of them, for the sum of \$12,267.05, together with interests and costs.

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for William A.
Wylie, Trustee, Plaintiff.

Duly verified.

[Endorsed]: Filed October 26, 1954. [4]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant C. A. Swanson & Sons, a Nebraska corporation, sued herein as C. A. Swanson & Sons Poultry Co., a corporation, and, answering the complaint on file herein, admits, denies and alleges as follows, to wit:

I.

Answering Paragraph IV of the said complaint, this defendant admits that on May 29, 1953, the bankrupt, Manuel Delatorre, was indebted to the said defendant for merchandise previously sold and delivered to the bankrupt on open account, but denies that said amount was \$16,830.78, and denies generally and specifically each and every other allegation in said Paragraph.

II.

That between the 5th day of June, 1953, and the 20th day of July, 1953, the date of the last item on the account between said bankrupt and this defendant, the bankrupt made seven payments to the defendant totalling the sum of \$8,689.70; denies generally and specifically each and every other allegation [6] contained in Paragraph V of the said complaint.

III.

Denies generally and specifically each and every allegation contained in Paragraph VI of the said complaint.

IV.

Denies generally and specifically each and every allegation contained in Paragraph VII of the said complaint; and in this connection alleges, on the contrary, that on May 29, 1953, and thereafter until sometime in July of 1953, this defendant believed, and had good cause to believe, that the bankrupt, Manuel Delatorre, was solvent, and did thereafter extend further credit to said bankrupt.

V.

Denies generally and specifically each and every allegation contained in Paragraph VIII of the said complaint.

As a Second and Affirmative Defense, this defendant alleges:

I.

That on or about the 12th day of June, 1953, said bankrupt was indebted to this defendant in the sum of \$10,931.13, and sought further credit from said defendant; that in order to induce this defendant to extend further credit said bankrupt executed on said date a chattel mortgage covering certain fixtures and equipment; that, relying upon said chattel mortgage, this defendant did on or about the 30th day of June, 1953, extend further credit to said bankrupt and delivered to him additional merchandise of the value of \$1395.90; that had this defendant known that said bankrupt was then insolvent, or that the chattel mortgage constituted a prefer-

ence, said defendant would not have delivered said merchandise to said bankrupt.

Wherefore, this defendant prays that plaintiff take nothing by his complaint; that this defendant may go hence with its costs; and for such other and further relief as to the Court may seem meet and just in the premises.

/s/ NORMAN A. OBRAND,
Attorney for Said Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 12, 1954. [7]

[Title of District Court and Cause.]

STATEMENT OF ISSUES

Comes now William A. Wylie, Trustee and Plaintiff, and C. A. Swanson & Sons Poultry Co., a corporation, Defendant, and represents that the issues of fact to be tried in the above-entitled action to be as follows:

I.

How much was the indebtedness owing from the bankrupt, Manuel Delatorre (hereinafter "Delatorre") to the Defendant, C. A. Swanson & Sons Poultry Co., a corporation (hereinafter "Swanson"), on May 29, 1953?

II.

What was the total amount of the payments made

by Delatorre beginning June 5, 1953, to and including August 20, 1953, to Defendant Swanson? [9]

III.

Was Plaintiff Delatorre insolvent at all times from and after May 29, 1953?

IV.

Did Defendant Swanson from and after May 29, 1953, and at all times have reasonable cause to believe in the insolvency of Delatorre, if the said Delatorre was in fact insolvent?

V.

Did the payments made to Defendant Swanson from and after May 29, 1953, up to the date of bankruptcy on August 20, 1953, enable the said Defendant Swanson to receive a greater percentage of payment on its claims than was received by other creditors of the same class?

VI.

Was merchandise delivered on credit by the Defendant Swanson to Delatorre after May 29, 1953?

CRAIG, WELLER &
LAUGHARN,

By /s/ C. E. H. McDONNELL,
Attorneys for William A.
Wylie, Plaintiff.

/s/ NORMAN A. OBRAND,
Attorney for C. A. Swanson
& Sons Poultry Co.

[Endorsed]: Filed January 3, 1955. [20]

[Title of District Court and Cause.]

INTERROGATORIES BY PLAINTIFF AND REPLIES

The defendant C. A. Swanson & Sons, a corporation, hereby replies to plaintiff's interrogatories, as follows:

Interrogatory No. 1:

What was the nature of the merchandise delivered on June 30, 1953, in the sum of \$1,395.90 as alleged in the second affirmative defense of the defendant herein? State the exact amounts of all materials delivered on that date.

Reply:

There was no merchandise delivered on said date. The item in question was the recharging to the account of an uncollected check. Counsel in error believed that this charge was for merchandise, and the answer was so prepared.

Interrogatory No. 2:

How was the merchandise delivered on June 30, 1953, in the sum of \$1,395.90 as alleged in the second affirmative defense delivered to the bankrupt?

Reply:

No merchandise was delivered. [27]

Interrogatory No. 3:

If the merchandise delivered June 30, 1953, was delivered by a representative of the defendant, C. A.

Swanson & Sons, what was the name of the truck driver who made the delivery?

Reply:

No merchandise was delivered.

Interrogatory No. 4:

What were the credit terms on which the merchandise delivered June 30, 1953, was delivered to the bankrupt?

Reply:

No merchandise was delivered.

Dated: January 19, 1955.

/s/ NORMAN A. OBRAND,

Attorney for Said Defendant.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 20, 1955. [28]

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS
AND REPLY

Defendant C. A. Swanson & Sons, a corporation, herewith replies to plaintiff's request for admissions, as follows:

1. That on June 5, 1953, a payment was received by the defendants here, C. A. Swanson & Sons, in the sum of \$2,542.91.

/ Answer: Admitted.

2. That on June 10, 1953, a payment was received by the defendants, C. A. Swanson & Sons, in the sum of \$1,632.00.

Answer: No such payment received on June 10, 1953, but it is admitted that a payment in said amount was received by this defendant May 29, 1953.

3. That on June 22, 1953, a payment was received by the defendant here, C. A. Swanson & Sons, in the sum of \$1,963.84.

Answer: No such payment has been received by this defendant.

4. That on July 6, 1953, a payment was received by the defendant here, C. A. Swanson & Sons, in the sum of \$1,000.00.

Answer: Admitted.

5. That on July 13, 1953, a payment was received by the defendant here, [30] C. A. Swanson & Sons, in the sum of \$500.00.

Answer: Admitted.

6. That on July 14, 1953, a payment was received by the defendant here, C. A. Swanson & Sons, in the sum of \$1395.90.

Answer: Admitted.

7. That on July 20, 1953, a payment was received by the defendant here, C. A. Swanson & Sons, in the sum of \$3232.40.

Answer: Admitted.

Dated: January 20, 1955.

/s/ NORMAN A. OBRAND,
Attorney for Said Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1955. [31]

[Title of District Court and Cause.]

MEMORANDUM OPINION

It is ordered that the plaintiff is entitled to judgment as prayed for.

The assertions of plaintiff that this judgment will result in an injustice because the time for filing claims has expired can be overcome by defendant complying with and in accordance with the provisions of Section 57(n) of the Bankruptcy Act, thus enabling the defendant to share the assets of the bankruptcy estate with other creditors rather than permit it to retain the benefit of its preference.

Plaintiff is directed to submit proposed judgment and findings within ten days.

Dated: This 16 day of March, 1955.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed March 16, 1955. [34]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing on the "Complaint to Recover Voidable Preference under the Provisions of the Bankruptcy Act; Section 60b," on the 2nd day of February, 1955, at the hour of 10:00 a.m. thereof; and the Plaintiff, William A. Wylie, Trustee, having appeared in person and had been represented by his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell, and the Defendant, C. A. Swanson & Sons Poultry Co., having appeared by and through its counsel, Norman Obrand; and evidence both oral and documentary having been offered and received; and the court being fully advised in the premises, does now make the following Findings of Fact, Conclusions of Law based thereon: [36]

Findings of Fact

I.

The court finds as true that the bankruptcy proceedings of Manuel Delatorre, dba R & M Egg Farms, were commenced by the filing of an involuntary petition in bankruptcy on August 20, 1953, in the United States District Court for the Southern District of California, Central Division, and that the said Manuel Delatorre was adjudged a bankrupt on the said involuntary petition on September 9, 1953.

II.

The court finds as true that William A. Wylie, the Plaintiff herein, was, on December 14, 1953, at a First Meeting of Creditors, elected trustee in the bankruptcy estate of Manuel Delatorre, and immediately thereupon qualified, and that he has at all times thereafter up to and including the date of the trial of this action acted as trustee in the said bankruptcy proceedings.

III.

The court finds as true that on May 29, 1953, and within four months of the commencement of the within bankruptcy proceedings, the bankrupt, Manuel Delatorre, was indebted to the Defendant, C. A. Swanson & Sons Poultry Co., in the sum of \$16,830.78 for merchandise previously sold and delivered to the bankrupt on open account.

IV.

The court finds as true that beginning on June 5, 1953, the bankrupt made seven payments to the Defendant, C. A. Swanson & Sons Poultry Co., a corporation, to a total sum of \$12,267.05, and that all of the said payments, and each of them, were made within four months of the commencement of the bankruptcy proceedings against Manuel Delatorre.

V.

The court finds as true that on May 29, 1953, and at all [37] times thereafter the bankrupt, Manuel Delatorre, was insolvent.

VI.

The court finds as true that on May 29, 1953, and at all times thereafter, the Defendant, C. A. Swanson & Sons Poultry Co., had reasonable cause to believe that the bankrupt, Manuel Delatorre, was insolvent, and the court further finds as true that specifically on June 5, 1953; June 10, 1953; June 22, 1953; July 6, 1953; July 13, 1953; July 14, 1953, and July 20, 1953, the same being the dates of payments totaling \$12,267.05, and on each of the said days the Defendant, C. A. Swanson & Sons Poultry Co., had reasonable cause to believe that the bankrupt, Manuel Delatorre, was insolvent.

VII.

The court finds as true that the effect of the deliveries and payments, on the aforesaid dates to a total of \$12,267.05, is to enable the Defendant, C. A. Swanson & Sons Poultry Co., to obtain a greater percentage of payment on its debt owing from the bankrupt than has been made, or will be made to other creditors of the same class.

Conclusions of Law

I.

That the payments on June 5, 1953; June 10, 1953; June 22, 1953; July 6, 1953; July 13, 1953; July 14, 1953, and July 20, 1953, totaling \$12,267.05, to the Defendant, C. A. Swanson & Sons Poultry Co., by the bankrupt, Manuel Delatorre, constituted a preference under the provisions of Section 60a of the Bankruptcy Act.

II.

That the preference paid to the Defendant, C. A. Swanson & Sons Poultry Co., as set forth in Conclusion I before, is a voidable preference under the provisions of Section 60b of the [38] Bankruptcy Act.

Dated: March 25, 1955.

/s/ BEN HARRISON,
U. S. District Court Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 25, 1955. [39]

In the District Court of the United States for the
Southern District of California, Central Division

No. 17,388-BH

WILLIAM A. WYLIE, Trustee in Bankruptcy
for MANUEL DELATORRE, dba R & M
EGG FARMS, Bankrupt,

Plaintiff,

vs.

C. A. SWANSON & SONS POULTRY CO., a
Corporation, et al.,

Defendants.

JUDGMENT

This matter having come on for hearing on the
"Complaint to Recover Voidable Preference under

the Provisions of the Bankruptcy Act, Section 60b," on the 2nd day of February, 1955, at the hour of 10:00 a.m. thereof; and the Plaintiff, William A. Wylie, Trustee, having appeared in person and had been represented by his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell, and the Defendant, C. A. Swanson & Sons Poultry Co., having appeared by and through its counsel, Norman Obrand; and evidence both oral and documentary having been offered and received; and it appearing that the court has made and filed its Findings of Fact and Conclusions of Law in this matter; and the court being otherwise fully advised in the premises,

Now, Therefore,

It Is Ordered that the Plaintiff is entitled to judgment [42] in the sum of \$12,267.05 against the Defendant, C. A. Swanson & Sons Poultry Co., a corporation, together with interest thereon and its costs; and

It Is Further Ordered, Adjudged and Decreed that the Defendant, C. A. Swanson & Sons Poultry Co., shall be entitled to file its claim against the bankrupt estate of Manuel Delatorre, dba R & M Egg Farms, No. 57,809-WM, in the United States District Court for the Southern District of California, Central Division, provided the said Defendant shall pay all sums due under this judgment within 30 days from and after the date of the final judgment herein.

Dated: March 25, 1955.

/s/ BEN HARRISON,
U. S. District Court Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 25, 1955.

Docketed and entered March 25, 1955. [43]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Plaintiff and to Craig, Weller & Laugharn,
Esqs., His Attorneys:

Please Take Notice that the defendant C. A. Swanson & Sons, a corporation, intends to and will move the above-entitled Court, in the department thereof presided over by the Hon. Ben Harrison, Judge, to vacate and set aside the decision and judgment in the above-entitled action, and to grant a new trial.

Said motion will be based upon this notice, upon all of the files, papers, pleadings and proceedings herein, upon the minutes of the Court, and will be made upon the following grounds:

1. Insufficiency of the evidence to justify the decision and judgment in that (a) the plaintiff failed to prove affirmatively that this defendant either knew, or had reasonable cause to believe, that the bankrupt was insolvent at the time the alleged preference was made, while on the other hand defendant

introduced positive testimony, uncontradicted, that it was led to believe by representations of the bankrupt, by reports of credit agencies, and by a cursory [45] glance at the bankrupt's books that the bankrupt was solvent; (b) plaintiff has failed to meet the burden of proof that this defendant knew, or had reasonable cause to believe, that the payments made to it by the bankrupt would result in a preference within the meaning of the Bankruptcy Act.

2. That the said decision and judgment is against the law, for the same reasons as are set forth in the preceding paragraph.

Dated: This 31st day of March, 1955.

/s/ NORMAN A. OBRAND,
Attorney for Said Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 1, 1955. [46]

[Title of District Court and Cause.]

MINUTES OF THE COURT—APRIL 11, 1955

Present: Hon. Ben Harrison, District Judge.

Counsel for Plaintiff: Frank Weller present at morning session, C. E. H. McDonnell present at afternoon session.

Counsel for Moving Defendant: No appearance at morning session, Norman A. Obrand present at afternoon session.

Proceedings:

For hearing motion of def't C. A. Swanson & Sons, a corp., for new trial, filed April 1, 1955, pursuant to notice by the clerk April 4, 1955.

There being no appearance at the morning session for defendant, Court Orders motion for new trial denied.

At 2 p.m. Court Orders that the order denying motion for new trial is vacated. Attorney Obrand argues in support of motion of said defendant for new trial.

Court Orders said motion for new trial denied.

EDMUND L. SMITH,
Clerk;

By MURRAY E. WIRE,
Deputy Clerk. [48]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO
COURT OF APPEALS

To the Hon. Ben Harrison, Judge of the said District Court, and to Craig, Weller & Laugharn, Esqs., Attorneys for Plaintiff Herein:

Notice is hereby given that C. A. Swanson & Sons, a corporation, defendant sued herein as C. A. Swanson & Sons Poultry Co., a corporation, hereby appeals to the United States Court of Appeals for

the Ninth Circuit from the final judgment entered in this action on March 25, 1955.

Dated: This 9th day of May, 1955.

/s/ NORMAN A. OBRAND,

Attorney for Said Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1955. [53]

In the United States District Court, Southern
District of California, Central Division
No. 17,388-BH Civil

WILLIAM A. WYLIE, Trustee in Bankruptcy
for MANUEL DELATORRE, dba R & M
EGG FARMS, Bankrupt,

Plaintiff,

vs.

C. A. SWANSON & SONS POULTRY CO., a
Corporation, et al.,

Defendants.

Honorable Ben Harrison, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

CRAIG, WELLER & LAUGHARN, by
C. E. H. McDONNELL, ESQ.

For Answering Defendant Swanson:

NORMAN A. OBRAND, ESQ.

February 2, 1955, 10:00 A.M.

The Court: You may proceed.

The Clerk: William A. Wylie, Trustee in Bankruptcy, vs. C. A. Swanson & Sons.

Mr. Obrand: We are ready, your Honor.

Mr. McDonnell: The plaintiff is ready.

The Court: You may proceed.

Mr. McDonnell: If it please the court, I think that a brief statement concerning the issues in the matter may be of some assistance.

You will recall that when counsel for the defendant and I were here at the time of the pretrial we filed a statement of issues. Since that time, through the medium of further discovery procedure, I believe the issues presented in that original statement have been produced.

For example, one issue presented in the statement of issues, No. 6, was that merchandise question. Was merchandise delivered on credit by the defendant Swanson to Delatorre after May 29, 1953?

An interrogatory filed by the plaintiff herein elicited a response indicating that this allegation in the complaint was in error; that as a matter of fact that represented a bookkeeping transaction on the books of the defendant and there actually had been no merchandise delivered, so that that [2*] issue is not presented in this matter.

The first two issues concerning the amounts of payment after May 29, 1953, to the date of bank-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ruptcy, that issue has been narrowed—those two issues, one and two, have been narrowed somewhat.

Demand for admissions filed here by the plaintiff have elicited a response indicating that with the exception of payments, I believe on June 10th and June 22nd, that is payments alleged in the complaint, are admitted so that we have narrowed the issue as to payment to just those two dates and——

The Court: What payments are in issue then?

Mr McDonnell: The payments which the plaintiff alleged were received by C. A. Swanson & Sons on June 10, 1953, in the amount of \$1,632 and the payment received, alleged to have been received on June 22nd, 1953, in the amount of \$1,963.84.

The other payments alleged in the complaint are admitted.

I would like to begin by calling Mr. Harold Harris.

The Court: I was wondering if the defendant desires to make any statement as to what he expects to prove.

Mr. Obrand: Yes, your Honor.

As counsel has stated, your Honor, the issues are very narrowed here. The only question is as to whether under the law there was a preference.

The defendant will attempt to show that although payments were received within the four-month period that there was no [3] knowledge on the part of the defendants of any insolvency or even any apparent insolvency on the part of the bankrupt.

They accepted the payments in good faith and in the ordinary course of business and there is one

payment which is alleged in the interrogatory which we cannot find unless it is made up of several smaller payments which we haven't been able to identify.

I think our case is very simple, if the court please. We admit that certain payments were made but we had no knowledge of any insolvency and they were accepted in good faith.

The Court: Are these the only two payments in issue?

Mr. McDonnell: Yes, I believe that is correct.

Mr. Obrand: The first payment that is mentioned, your Honor, we acknowledge having received it on a different date but we acknowledge having received it.

Mr. McDonnell: I am in a quandary in the reply to request for admissions filed here by the defendant through its attorney.

Item No. 1 says that they admit on June 5, 1953, a payment was received by this defendant in the sum \$2,542.91.

Do I understand that that admission is not correct, Mr. Obrand?

Mr. Obrand: We acknowledge having received a payment such as is mentioned in interrogatory No. 1 but on a different [4] date than specified in your interrogatory.

Mr. McDonnell: Then you do not admit you received it on June 5?

Mr. Obrand: Correct.

The Court: Is the payment of June 10 and 22nd admitted?

Mr. McDonnell: Those are the two which are denied, your Honor. They deny that they received a payment on June 10th and they deny that they received a payment on June 22nd.

I am rather taken back after the formal admission filed in this matter that they received it.

Mr. Obrand: I am sorry, I had my interrogatories mixed up. No. 1 is admitted and No. 2 is the one——

The Court: What is No. 1?

Mr. Obrand: On June 5 a payment was received in the sum of \$2,542.19.

Mr. McDonnell: That is admitted?

Mr. Obrand: Yes. I am sorry I got the numbers wrong.

Mr. McDonnell: Nos. 2 and 3.

Mr. Obrand: What I meant was of the two which are in question, the second one, that is No. 2 on June 10th, it is alleged that a payment of \$1,632 was received by the defendants. We deny that such a payment was received on June 10th but on May 29 we received such a payment.

Mr. McDonnell: If the court please, that will be a subject of legal argument on the question of when payment is [5] made. In other words, the problem, legal problem being presented, is payment made when the check is received or is payment made when the check clears the bank.

Of course the plaintiff takes the position and did in their complaint and does now, that payment is made under California law when the check is honored at the bank or otherwise paid.

The Court: How about this item of June 2nd?

Mr. Obrand: June 22nd. We have no record of any such payment whatsoever.

Mr. McDonnell: That will be a subject of proof, your Honor.

The Court: Then so I can thoroughly understand this, wasn't there some claim that there was a transfer of a chattel mortgage or something?

Mr. McDonnell: That will be a portion of the proof in the plaintiff's case as to the mortgage of chattels.

The mortgage of chattels has been invalidated previously in the bankruptcy court for failure to comply with the notice required by the California law.

The Court: Then that is not an issue here.

Mr. Obrand: No claim was even filed in the bankruptcy court under that.

Mr. McDonnell: That is correct. I think that generally speaking if I can outline the issues which I believe will be [6] presented it will clarify the atmosphere.

These are the issues. First of all was a payment made on June 10th? Secondly was a payment made on June 22? Then the general issue: Was there an insolvent condition after May 26 and finally of course——

The Court: The date of bankruptcy was when?

Mr. McDonnell: The date of bankruptcy was August 20 I believe, your Honor, 1953.

The Court: Are these the only two items this suit is over?

Mr. McDonnell: Well the suit is over some seven payments only two of which are denied.

The Court: What are the other payments that are admitted?

Mr. McDonnell: There was a payment on June 5, 1953, of \$2542.91.

The Court: Yes.

Mr. McDonnell: There was a payment admitted on July 6, 1953, of \$1000.

There was a payment admitted on July 13, 1953, of \$600.

There is a payment admitted on July 14, 1953, of \$1,395.90.

There is a payment admitted on July 20, 1953, of \$3,231.40.

The total of those payments is \$8,671.21.

The complaint is for \$12,267.05 and the difference between the two figures is the two payments which are not admitted, respectively, of \$1,632. [7]

The Court: How much were the two payments?

Mr. McDonnell: \$3,595.84 is in dispute as to payments. The defendant, of course, taking the position that none of the payments were preferential.

The Court: May I make inquiry as to whether there has been any effort to adjust this matter.

Mr. McDonnell: We have received no offer of settlement at all, your Honor.

Mr. Obrand: There have been no discussions in that connection, your Honor.

The Court: These are hardship cases, and that is the reason I asked the question.

Mr. McDonnell: We are aware of that, your Honor. Shall I proceed?

The Court: You may proceed.

Mr. McDonnell: Mr. Harris, will you take the stand?

HAROLD HARRIS

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harold Harris.

Direct Examination

By Mr. McDonnell:

Q. Mr. Harris, by whom are you presently employed? A. William A. Wylie. [8]

Q. Is he the trustee in bankruptcy in the case of Manuel Delatorre, doing business as R & M Egg Farms? A. Yes, sir.

Q. What generally are your duties for Mr. Wylie? A. I am Mr. Wylie's agent.

Q. In connection with the Manuel Delatorre bankruptcy were you designated by Mr. Wylie to pick up the books? A. Yes, sir.

Q. And did you pick up the books?

A. Yes, sir.

Q. From whom?

A. From Mr. Delatorre's store and from Mr. Delatorre's attorney.

Q. Do you have those books which you picked up in court? A. Yes, sir.

Q. Are they the books which are over here on the press table? A. Yes, sir.

(Testimony of Harold Harris.)

Q. Have those books been out of the hands of Mr. Wylie to your knowledge since you picked them up? A. No.

Mr. McDonnell: I have no further questions.

Mr. Obrand: No questions.

Mr. McDonnell: You may be excused, Mr. Harris. Call Mr. Mulherin. [9]

THOMAS MULHERIN

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Thomas M. Mulherin.

Direct Examination

By Mr. McDonnell:

Q. Mr. Mulherin, what is your business or occupation?

A. I am a certified public accountant.

Q. Have you had experience in investigating matters, Mr. Mulherin? A. Yes, I have.

Q. What was that experience?

A. I was with the FBI.

The Court: I might say the court is familiar with this witness' experience and background.

Mr. McDonnell: Would the court take judicial notice of his background?

The Court: Unless counsel wants to go into it.

Mr. Obrand: I will stipulate to that. It is just a question of fact here.

(Testimony of Thomas Mulherin.)

Q. (By Mr. McDonnell): Mr. Mulherin, were you employed by Mr. William A. Wylie, trustee in bankruptcy, for the bankrupt in this matter to do some accounting work in this matter? [10]

A. Yes, sir.

Q. What was the general nature of the accounting work you were to perform?

A. To examine Mr. Wylie's records—Mr. Wylie's records which were formerly Mr. Delatorre's and to examine the records of others in an attempt to determine, No. 1, whether there appeared to be any concealment of assets in this case and, No. 2, whether or not there appeared to be any preferential payments to creditors.

Q. Did you inspect the books in Mr. Wylie's hands? A. I did; yes, sir.

Q. Mr. Harris identified the books over here on the press table as those in Mr. Wylie's hand. Before court commenced did you inspect those books?

A. Yes, sir, I did.

Q. Are those the ones you inspected and used in your accounting? A. Yes, sir.

Q. Did you also inspect the books of the defendant C. A. Swanson & Sons?

A. Yes. I examined the books of C. A. Swanson through Mr. Elliott who made them available to me.

Q. When you inspected the books of Mr. Wylie which had been formerly Mr. Delatorre's, did you attempt to analyze whether or not there was a condition of insolvency or solvency? [11]

A. Yes, I did.

(Testimony of Thomas Mulherin.)

Q. Did you specifically attempt to ascertain the condition as of November 26, 1952?

A. I did, yes, sir.

Q. Did you find an insolvent condition on the books as of that time?

A. I found that the liabilities were greater than the assets by \$1,722.12 according to the books?

Q. Now, you said you examined the books of C. A. Swanson & Sons? A. Yes, sir.

Q. Which were made available to you by the defendant? A. Yes, sir.

Q. Did you in that—in the course of that examination have occasion to inspect a payment or payments sometime around June 10, 1953?

A. If I may I would like to lay the background. There is, basically, of course, no difference in our accounting. I think we agree as to the amount due at the end. The only difference is this. In the statement I prepared for you I attempted to show when a check was returned by the bank and then indicate the actual date of payment until I had some documentary evidence which showed the date of payment rather than the date which was entered on Mr. Swanson's books which, generally speaking, was the date the check was received by Mr. [12] Delatorre. That is the only difference with respect to any of these items.

Q. Well now, let us take the case of the June 10 item. Do your work sheets show when the check was received?

A. The June 10th item—that is \$1,632. It was

(Testimony of Thomas Mulherin.)

originally received as check 2763 on the Bank of America by C. A. Swanson & Sons.

Mr. Obrand: Just a moment, if your Honor please. I think at this time if the witness is to testify from a work sheet that a proper foundation should be laid for the work sheet, I don't know whether it was prepared at the time he made the examination of the Swanson books or whether it was afterwards made up, information he obtained from the bank books.

The Court: Did you make up the work sheet from the books of the company?

The Witness: My basic work sheets were made at the time I examined the records of Swanson, the accounts receivable ledger. It is made up from the basic documents. And starting with that I asked Mr. Elliott to obtain for me and he did the invoices showing the goods that were sold.

There was one item after examining the invoices of 19—excuse me, of \$1,635. When I examined the invoices it was the R & S Egg Company instead of R & M.

I brought that to Mr. Elliott's attention and he said [13] it was obviously an error on the C. A. Swanson books which they would correct and they did.

Now, after that was eliminated there was no difference in our accounting except that I asked Mr. Elliott also for the notes from the bank when these checks were returned and using those and using the records of Mr. Delatorre as to checks, I established

(Testimony of Thomas Mulherin.)

these dates of June 10 and June 22nd of which we are speaking, rather than May 29. They are all within the four-month period.

Q. (By Mr. McDonnell): Do I understand your testimony to be that the item of \$1,632 was originally a check on May 29?

A. That is correct, yes, sir.

Q. And what happened to that check? Can you tell us from your inspection of the records?

A. Yes.

The Court: When you are talking about May, that is 1953?

Mr. McDonnell: Yes, it is all in 1953.

The Witness: All these payments, whether we take Mr. Swanson's records, Delatorre's records or bank records are all within the four-month period. It is just a question of days.

On June 3rd the check was returned, according to the notations made by the bank which Swanson received a copy of and then on June 10 a new check, check No. 46 drawn on the Torrance bank, was given in lieu of that check for \$1,632 [14] and cleared the bank.

Q. On the 10th of June? A. Yes, sir.

Q. Now, as with respect to the item of \$1,963.84, which the trustee has alleged was paid C. A. Swanson & Sons on May 22nd, can you give us the history of that transaction?

A. Yes. That consists of two items. May 29 receipt of \$1,945.35 as reflected by the accounts receivable ledger of Swanson & Sons and an item

(Testimony of Thomas Mulherin.)

of June 12 for \$1,849 also shown by the Swanson records.

We show the check, the \$1,945.35 item was returned by the bank on June 3rd, 1953, and on June 22nd they obtained a cashier's check in lieu thereof on the Torrance bank and that added to the \$1,849 makes up the amount you mentioned.

Q. From the Swanson books or from the Delatorre books could you tell what the \$1,849 item was, whether a check or cash or what?

A. That item does not appear on Delatorre's books. My notation respecting it was gathered from Swanson's books and it is shown among cash receipt records as being \$1,849 and I so show it on my sheet.

Q. Does it appear as an item of cash received?

A. I found no check in Swanson's records to indicate it was a check issued or, I should say, in Delatorre's. I found no check in Delatorre's records. [15]

Q. You have given each check to the payments of the 10th and 22nd of June, 1953?

A. Yes, sir.

Q. On the basis of when they were received from the notations that you have?

A. To the best of my ability going through basic documents, those are the dates.

Mr. McDonnell: That is all the questions I have of this witness.

Mr. Obrand: No questions, your Honor.

Mr. McDonnell: I should like to call Mr. Creal.

RAYMOND CREAL

called as a witness by the plaintiff, being first sworn,
was examined and testified as follows:

Direct Examination

By Mr. McDonnell:

Q. Mr. Creal, what is your business or occupation? A. Public accountant.

Q. And were you a public accountant during the years 1952 and 1953? A. Yes.

Q. And did you function as a public accountant for Mr. Manuel Delatorre and Mr. Bone, his partner, up until Mr. Bone's death?

A. Yes, I did. [16]

Q. In your capacity as public accountant did you have from time to time the duty of taking a statement off of the books of R & M Egg Farms?

A. Yes, I did.

Q. Did you take one off as of the 29th of March, 1953? A. Yes.

Q. Do you have your work papers with you that were the basis of the statement that you took off?

A. I have some.

Q. Do you have those papers which will show what that statement was?

A. Yes. I have a balance sheet and a profit and loss statement of March 29.

Q. Was March 29 the date of death of Mr. Bone, the other partner? A. Yes.

Q. What does the balance sheet that you pre-

(Testimony of Raymond Creal.)

pared as of March 29 show with respect to total assets at that time? A. \$25,420.37.

The Court: What was the date of the death of the partner?

Mr. McDonnell: March 29.

Q. (By Mr. McDonnell): And this was prepared sometime after that?

A. Shortly subsequent to his death, yes.

Q. Within a matter of a few weeks? [17]

A. Yes.

Q. Now, what does your balance sheet show as to the liabilities of R & M Egg Farms on March 29, 1953?

A. \$35,600. I don't have the total but it is some \$35,600, there being a deficit at that time of \$15,291.

Q. You mean that is the amount that the liabilities exceeded assets on March 29, 1953, of this business?

A. Yes, and I am reading from the balance sheet.

Q. Which you prepared? A. Yes.

Q. Now, did you use the books of Mr. Delatorre in preparing that balance sheet?

A. Yes, I did.

Q. Generally what books did you use, do you recall?

A. There are the receipts and disbursement journals, accounts receivable and accounts payable; ledgers, subsidiary ledgers.

(Testimony of Raymond Creal.)

Q. You used the ledgers and the journals generally? A. Yes.

Mr. McDonnell: I have no further questions of Mr. Creal.

Cross-Examination

By Mr. Obrand:

Q. Mr. Creal, did you at any time, about March 29, 1953, prepare any statement for the purpose of giving it to credit bureaus? [18]

A. Not particularly, no.

Q. Was any such request made of you by either Mr. Delatorre or Mr. Bone? A. No.

Q. Was any of the information which you acquired for the purpose of preparing the statement to which you just testified, given to C. A. Swanson & Sons? A. Well—

Q. To your knowledge?

A. To my knowledge, no.

Q. And to your knowledge was any information given to C. A. Swanson & Sons about the financial condition of the company?

A. I am not exactly sure whether information which appeared on the balance sheet here was submitted to them or not.

I had several accountants in my office and I allowed them to have copies of the financial statements and so forth that I had prepared at the time of Mr. Bone's death. We wanted a partnership accounting at that time.

Q. And you say at the time of his death there was an excess of liabilities over assets?

(Testimony of Raymond Creal.)

A. Yes.

Q. Of approximately \$10,000? A. Yes.

Mr. Obrand: No further questions. [19]

Redirect Examination

By Mr. McDonnell:

Q. Mr. Creal, did you continue as the accountant for Mr. Delatorre after the 29th of March, 1953?

A. Yes.

Q. To your knowledge did his business improve after March 29 or deteriorate?

A. It did not improve.

Q. Would you say it went along at about the same level? A. Yes.

Mr. McDonnell: No further questions.

The Court: How did they settle the partnership differences, do you know?

The Witness: No, sir, I don't know. I can only believe——

The Court: I don't care what you believe. You don't know?

The Witness: No, I haven't any facts.

The Court: What happened when Mr. Bone died? Was there any settlement made with his estate or anything?

Mr. McDonnell: I don't believe there was, your Honor. As you can see the business, according to Mr. Creal's testimony, was insolvent and I believe it was just continued as an individual proprietorship by Mr. Delatorre.

(Testimony of Raymond Creal.)

Are there any further questions of this witness?

The Court: No further questions. [20]

Mr. Obrand: No further questions.

Mr. McDonnell: May this witness be excused?

The Court: Yes, so far as the court is concerned.

Mr. McDonnell: I should like to call Mr. Delatorre, please.

MANUEL DELATORRE

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Manuel Delatorre.

Direct Examination

By Mr. McDonnell:

Q. Mr. Delatorre, are you the bankrupt in the case Manuel Delatorre, doing business as the R & M Egg Farms? A. That is right.

Q. You had been in partnership with Mr. Bone originally in this business, hadn't you?

A. Yes, sir.

Q. How long had you and Mr. Bone been operating the R & M Egg Farms?

A. About two years.

Q. Two years before it was put into bankruptcy?

A. Two years before it was put into bankruptcy, yes.

(Testimony of Manuel Delatorre.)

Q. That would be sometime in 1950 or '51 when you started the business? [21]

A. Around 1950.

Q. Now, from whom did you buy your eggs, Mr. Delatorre?

A. Well, our main supplier was the C. A. Swanson.

Q. That is C. A. Swanson & Sons Poultry Company? A. That is right.

Q. Had you done business with them ever since you started? A. Well, mostly.

Q. What percentage of your eggs would you say you had been buying from them in 1951 and 1952? A. I would say about 60 per cent.

Q. They were your major suppliers?

A. That is right.

Q. What had been your credit terms during the early months of 1953, Mr. Delatorre, with Swanson & Sons? A. 30 days.

Q. You mean you paid them 30 days after the eggs were purchased? A. That is right.

Q. Was there any change in that arrangement with C. A. Swanson & Sons?

A. Well, around May 1st they started cutting down my credit quite a bit. In fact they cut it down to about 10 days.

Q. They reduced the time in which you had to pay from [22] 30 days to 10 days, is that correct?

A. That is right.

Q. Who notified you of that reduction?

A. Mr. Elmo called me down to his office there

(Testimony of Manuel Delatorre.)

and he told me that things didn't look so good, so that he was going to cut my credit down.

Q. Now, you say Mr. Elmo called you down to his office. Is that the C. A. Swanson & Sons office?

A. That is right.

Q. Was he connected with them to your knowledge?

A. Well, he was one of the head men at that time.

Q. And he said that things weren't so good so he was going to cut your credit down to 10 days?

A. That is right.

Q. Then what happened after that—after the 1st of May?

A. Things went along until about the 1st of June. They come down to my place, Mr. Elmo and Mr. Elliott.

Q. And what happened when they came to your place of business?

A. They took inventory of everything I had and they demanded a chattel mortgage on my fixtures, trucks and everything else.

Q. Did they say anything about the status of your account with them at that time? [23]

A. They did go through my books.

Q. Who is it that went through your books?

A. Elmo and Mr. Elliott.

Q. And did you make all your books available to them so they could inspect them at that time?

A. I did.

Q. Now, you said something about a chattel

(Testimony of Manuel Delatorre.)

mortgage a few moments ago. Was it at that time that they asked for a chattel mortgage?

A. Well, they took inventory at the time they were over there and then a few days later I went back to C. A. Swanson and signed the chattel mortgage.

Q. Did they tell you you had to sign it when they were there?

A. Well, I imagine they did.

Q. I am going to show you a photostat—I might say for the court's benefit that counsel and I have inspected this document ahead of time and have agreed it is a photostat of the chattel mortgage. Counsel aren't able to find the original.

I am going to show you a photostat of a document called "Mortgage of Chattels" and I want you to look at the signature on the reverse side and see if you recognize that.

Mr. Obrand: We will stipulate that that is a photostatic copy and a true and correct photostatic copy of the original [24] as received by C. A. Swanson & Sons.

Mr. McDonnell: Then I shall offer it as Trustee's Exhibit first in order.

The Court: Received.

The Clerk: Plaintiff's Exhibit 1.

(The document referred to was marked Plaintiff's Exhibit 1 and received in evidence.)



Mortgage of Chattels

THIS MORTGAGE, made this 12th day of June, 19 53
 by Jose M. Dela Torre dba R & M Farms 1221 So. Hawthorne Blvd.
Hawthorne, California
 County of Los Angeles, State of California, Mortgagor,
 To C. A. Swanson & Sons
337 South Anderson Street, Los Angeles 33, California
 County of Los Angeles, State of California, Mortgagee,
 WITNESSETH: That the said mortgagor mortgages to the said mortgagee all that certain personal property
 situated at 1221 South Hawthorne Boulevard, Hawthorne, California
 in the County of Los Angeles State of California, and described as follows, to-wit:

- 1 - 12' Hussmann Single Price Showcase #170614
- 1 - Dayton Scale - Style #6563 - Serial #1138127
- 1 - American Slicer - Model 52 - Serial #544572
- 1 - 12' Open Top Ward Monterey Refrigerated Display Case
- 1 - 5 Door - 4 Shelf Reach-in Refrigerated Box
- 1 - Liquid Carbonic Corp. Freezer
- 1 - 24" Sanitary Scale - Ser. #5522
- 1 - National Cash Register - Serial #3365306
- 1 - Victor Hand Adding Machine
- 1 - Paymaster Checkwriter - Model Y - Ser. #210272
- 1 - Weillink Fire Insulated Safe - Ser #IX-42509
- 9 - Candling Machines - B-B Lights
- 1 - 1948 Chevrolet Truck - Ser #BED 745452
- 1 - 1946 Ford Truck - Serial #2B51FB

as security for the payment to the said mortgagee of the sum of Twelve thousand three hundred
twenty seven and 03/100 Dollars (\$12,327.03), on the 12th
 day of June, 1953, with interest thereon at the rate of 6 per cent per annum,
 in accordance with the terms of a promissory note of even date herewith, executed and delivered by the said
 mortgagor to the mortgagee; and also as security for the discharge and performance of all obligations and
 promises by said mortgage herein contained.

\$ 12,327.03 June 12, 1953
On demand after date, for value received, I
 promise to pay to C. A. Swanson & Sons
 or order at 337 South Anderson Street, Los Angeles, California the sum of
Twelve thousand three hundred twenty-seven and 03/100 Dollars
 with interest at the rate of Six per cent per Annun from date, until paid,
 interest payable Quarterly, and if not so paid to be compounded
 and bear the same rate of interest as the principal; and
 should the interest not be paid - then the whole sum of principal and interest shall become immediately
 due and payable at the option of the holder of this note. Principal and interest payable in lawful money of the United States.

Jose Manuel Dela Torre

Said mortgagor promises to pay said sum of Twelve thousand three hundred and 03/100 Dollars
 (\$ 12,327.03), with interest thereon at the time and in the manner specified in said promissory
 note; and also that he will, during the continuance hereof, keep the mortgaged property in good con-
 dition and repair; and further that he will not remove, nor permit to be removed, any part of said
 property from the above premises without the written consent of the mortgagee first had and obtained;
 and further that he will, during the continuance hereof, keep the mortgaged property insured against
 loss by fire in some company which shall be satisfactory to the mortgagee, in an amount not less than

Dollars (\$) loss, if any, payable to the
 mortgagee, as his interest may appear.

The said mortgagor hereby declares and warrants to the mortgagee that he is the absolute and sole
 owner, and is in possession, of all said mortgaged property, and that the same is free and clear of all liens,
 encumbrances and adverse claims.

It is further agreed that, if said mortgagor shall fail to make payment of any part of the principal or
 interest as provided in said promissory note at the time and in the manner therein specified, or if any
 breach be made of any obligation or promise of the said mortgagor herein contained or secured hereby,
 then the whole principal sum unpaid on said promissory note, with interest accrued thereon, shall immedi-
 ately become due and payable, at the option of the mortgagee; and the said mortgagee may at once pro-
 ceed to foreclose this mortgage according to law; or the said mortgagee may, at his option, and he is
 hereby empowered so to do, enter upon the premises where the said mortgaged property may be and take
 possession thereof, and remove, sell and dispose of the same, and from the proceeds of sale retain all costs
 and charges incurred by him in the taking or sale of said property, including any reasonable attorney's fees
 thereby incurred; also, he may take all sums due him on said promissory note under any provision hereof
 including attorney's fees not exceeding per cent upon the amount due, and any surplus of such
 proceeds remaining shall be paid to the mortgagor.



It is further agreed that upon any sale of the mortgaged property according to law, or under the power herein given, that the said mortgagee may bid on the said sale, or make a purchase of the said mortgaged property, or any part thereof.

WITNESS my hand this 13 day of June, 1953

Jose Manuel De La Torre

STATE OF CALIFORNIA,

County of Los Angeles } ss.

ON THIS 13 day of June, A.D., 1953, before me,

a Notary Public in and for said County and State, personally appeared

Jose Manuel De La Torre, known to me,
R. M. Farns

to be the person whose name subscribed to the within Instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

H. K. Livingston
Notary Public in and for said County and State.

My Commission Expires April 19, 1957

No.

Mortgage
CHattel

.....
Jose M. De La Torre

To

.....
C. A. Swanson & Sons

DATED, 19

DOCUMENT No. 2160

RECORDED AT REQUEST OF
C. A. Swanson & Sons

JUN 15 1953

55 MIN 10 A.M.

BOOK 11972 PAGE 69
OFFICIAL RECORDS

County of Los Angeles, California

FEE \$ 2.40

WAME B. BEATTY, County Recorder

By F. Brand Deputy

ORDER No.

When recorded, please mail this
Instrument to
REQUEST OF

C. A. Swanson & Sons

211 So. Main St.

L.H. 23

246/1127



(Testimony of Manuel Delatorre.)

The Court: That is not involved in this.

Mr. Obrand: No.

Mr. McDonnell: That is being offered on the question of the issue as to whether or not there was reasonable cause to believe—not over the issue as to validity or invalidity.

Mr. Obrand: And that is why we are not objecting.

Q. (By Mr. McDonnell): You are familiar with the chattel mortgage in evidence. Did it cover all your assets? A. Everything.

Q. Did it include your personal automobile?

A. No.

Q. But it got all the other assets of your business, is that correct?

A. Everything but my canned goods.

Q. Now, that is the canned goods in your retail store? A. That is right.

Q. Mr. Delatorre, did you ever give the C. A. Swanson & Sons any checks which bounced—that is, wouldn't clear the [25] bank?

A. Quite a few.

Q. Had you given them to them in the month of May, 1953? A. That is right.

Q. After the chattel mortgage was given did they accept any more of your checks?

A. I don't think so. I mean I had to give them certified checks.

Q. They wouldn't accept your checks?

A. That is right.

(Testimony of Manuel Delatorre.)

Q. Did you give them any cash or any customers' checks?

A. It is too far back to remember. I think I did.

Q. But all this took place after June 1st—after they came out to your place of business and went through your books? A. That is right.

Mr. McDonnell: I have no further questions at this time.

The Court: What kind of business were you running?

The Witness: Egg, wholesale and retail.

The Court: Where?

The Witness: In Hawthorne.

The Court: After you gave them this chattel mortgage did they continue to furnish you with merchandise—eggs?

The Witness: No.

The Court: These checks that you gave them after that were for money that you owed them before that time? [26]

The Witness: That is right. You see I had to go out and buy eggs from other people.

The Court: They cut off your credit when they took your chattel mortgage?

The Witness: That is right.

Cross-Examination

By Mr. Obrand:

Q. Mr. Delatorre, were you buying eggs from anyone else after June 1st?

A. Yes. I was forced to go out and buy eggs

(Testimony of Manuel Delatorre.)

from other brokers in order to keep my business alive.

Q. And you were attempting to keep your business alive weren't you? A. That is right.

Q. And you so told C. A. Swanson & Sons you have to buy eggs elsewhere to keep your business alive, did you not?

A. No, sir. They advised me to go out and buy eggs from other people so I could pay them.

Q. Now, did you know you were insolvent—withdraw that.

Did you know that you owed more than you could pay on June 1st, 1953?

A. That is right, I did.

Q. Did you tell C. A. Swanson & Sons that?

A. No, I didn't. [27]

Q. As a matter of fact weren't you advised by several credit agencies to get some credit information as to your assets and liabilities at about that time? A. I was.

Q. On June 1st when this chattel mortgage was given did you tell anyone that you owed more money than you had in the way of assets?

A. No, I don't think I did.

The Court: You didn't advertise it, did you?

The Witness: No, sir.

Q. (By Mr. Obrand): As a matter of fact you tried to keep your business going? You felt you could pull out of it, did you not?

A. Well, I was just taking a chance.

Q. Did C. A. Swanson & Company tell you they

(Testimony of Manuel Delatorre.)

would not sell you any more eggs after June 1st?

A. No. They didn't actually say that but—I mean they told me that any eggs that I bought I had to pay them cash for.

Q. Well, would you say for sure that you did not give them an ordinary check after June 1st—that is one that was not certified?

A. It is pretty hard to remember. I made out so many checks at that time that I couldn't actually remember.

Q. It is possible that you gave them some checks after [28] June 1st that were not certified, is it not?

A. I probably did.

Q. Now, when you mentioned having given them a chattel mortgage about June 1st to include everything, you didn't mean everything you had in the business, did you?

A. It was practically everything I had.

Q. Did it include your stock on hand?

A. No.

Mr. McDonnell: To which I object.

The Witness: You can't give——

Mr. McDonnell: I object to that because it would be illegal to give a stock in trade in a chattel mortgage.

Mr. Obrand: That is beside the point. The question is whether he did it.

The Court: Doesn't the document speak for itself? What did he own that wasn't covered?

Mr. Obrand: That is what I am trying to bring out here, your Honor, what else he had.

(Testimony of Manuel Delatorre.)

The Court: Then why don't you ask him that?

Mr. Obrand: Then I will have to refer to the chattel mortgage. May I use my copy, counsel?

The Court: Yes.

Q. (By Mr. Obrand): On this chattel mortgage, dated June 12, there is included only certain items of fixtures and equipment. [29]

A. That is right.

Q. Is there not? A. Yes.

Q. But you had other assets beside those mentioned in the chattel mortgage?

A. Not outside of just stock and my automobile.

Q. Did you have accounts receivable?

A. That is right, I had accounts receivable.

Q. About how much did you have in accounts receivable at that time?

A. I don't remember.

Q. Did you have any other assets beside the accounts receivable and the stock and your automobile? A. No, sir.

Q. Any real property?

A. Well, just my house which I was paying for.

Q. Well, did you tell the Swanson people that you had other assets besides those?

A. No, sir.

The Court: For my information may I ask were the checks given here and that are in dispute, were those payments on the chattel mortgage?

Mr. Obrand: Is the court asking me that question?

(Testimony of Manuel Delatorre.)

The Court: Yes, I am asking counsel on both sides.

Mr. Obrand: I don't believe so, your [30] Honor.

The Court: There was a chattel mortgage——

Mr. Obrand: If the court wishes me to make a statement with respect to the chattel mortgage I would like to do so.

The Court: I am trying to determine whether the chattel mortgage was taken for a certain amount and there were other obligations still owing or was it taken for all obligations?

Mr. Obrand: The chattel mortgage was taken merely as a form of security, or so the Swanson people thought. Actually it was held as a whip over Mr. Delatorre's head and for no other reason.

Payments as they were received, were not credited and we will be so prepared to prove they were not credited against any chattel mortgage.

It wasn't even prepared in a legal way—that is legal with respect to the laws of California, but merely as a whip over his head to make sure he made payments.

The Court: Then the chattel mortgage is for a specified amount?

Mr. Obrand: Yes, I believe it is.

The Court: What I am trying to ascertain is, was the chattel mortgage for a pre-existing debt?

Mr. Obrand: Yes, sir. It mentioned \$12,327 as of a certain date. Actually, your Honor, we will—we are offering to show and we will attempt to

(Testimony of Manuel Delatorre.)

show later that the fixtures and equipment which are the subject of the chattel mortgage here, [31] were only valued at \$1,000 which gives the court an idea of the purpose of the chattel mortgage.

The Court: What I am trying to find out is this. You have a list of checks that amount to almost \$12,000 within the four-month period. Now, was this chattel mortgage taken for a pre-existing debt or for future obligations?

Mr. Obrand: For a pre-existing debt, sir. In other words they said you owe us this much money and at this time we don't like the way things are going. We would like to have some measure of security that you are going to pay us. So they said, "We want you to sign a chattel mortgage," and he signed one.

The Court: So, so far as the chattel mortgage is concerned it is out of this case. It has been set aside by the bankruptcy court.

Mr. Obrand: Your Honor; I don't know that it has actually been set aside. I know they have not filed a claim for it.

Mr. McDonnell: It has been set aside.

The Court: But doesn't a chattel mortgage in effect cover the same items that are represented by these checks? Just a moment——

Mr. McDonnell: Perhaps I can help the court a little bit.

Mr. Mulherin's accounting indicates that on the date of the chattel mortgage, that is the actual date of the signing, [32] there was about \$12,655 owing

(Testimony of Manuel Delatorre.)

which matches fairly closely with the amount of the chattel mortgage.

The Court: The chattel mortgage is for \$12,327 and these checks amount to \$12,266.

Mr. Obrand: There is no connection between those two items, your Honor, to the best of my knowledge.

Mr. McDonnell: I think there is none. I don't believe payments were ever applied against the chattel mortgage.

The Court: What I am trying to find out is this. I think counsel can answer the question.

Swanson apparently assumed that the credit risk was poor and they took a chattel mortgage for an amount that was virtually the same amount as was owed.

Mr. Obrand: Well, I think the court is assuming a little more than I said. What I did say was this, your Honor, that——

The Court: There is no use in holding a whip over his head. He already owed them over \$12,000 and they weren't giving him any more credit.

Mr. Obrand: But they felt with the knowledge of his owing a chattel mortgage he couldn't dispose of his equipment or at least he would so feel, and that he might be inclined to pay his bills quicker.

The Court: You may proceed.

Q. (By Mr. Obrand): I believe you stated on direct examination, Mr. Delatorre, that your checks did not bounce [33] until about April. Was that correct? A. No, around March.

(Testimony of Manuel Delatorre.)

Q. Well, isn't it true that you had checks that bounced before March? A. (No answer.)

The Court: Did they bounce during the lifetime of Mr. Bone?

The Witness: Not—I would say one or two checks probably did.

Q. (By Mr. Obrand): Wouldn't you say that it was true that it was nothing unusual for a check to bounce in your business?

A. No. There was one time I told them to hold two checks but they put them in ahead of time and that caused a lot of my checks to bounce.

Q. Who did you tell that to? A. Elmo.

Q. And when your checks bounced afterward it was no different than what happened in the early part of 1953, is that correct?

A. Have you my records there. My records show. My ledger will show that to any broker that I was doing business with, two months previous to the bankrupt court, my credit was open with any broker.

Q. Didn't you testify in another courtroom last year [34] that checks were bouncing for other people beside Swanson?

Mr. McDonnell: Just a minute. I will object to that question as assuming a fact not in evidence. The testimony in other courts can be determined by transcripts. Transcripts can be obtained and presented and used as a basis of examination but to assume in another courtroom at another time he said something——

(Testimony of Manuel Delatorre.)

Mr. Obrand: I have to ask the question first before I can impeach the witness.

The Court: May I ask what materiality that has?

Mr. Obrand: To show that it was nothing unusual for checks to bounce and that it did not indicate insolvency and in and of itself the mere fact checks bounced—because there had been a pattern of checks bouncing in the past——

Mr. McDonnell: That is assuming the very fact I am contending he is assuming—a fact not in evidence.

Mr. Obrand assumes the checks had bounced in the past and that is a matter of proof.

Mr. Obrand: I am asking him if he ever made such a statement.

The Court: I will admit the evidence. I don't think it means too much one way or the other.

Q. (By Mr. Obrand): Did you testify that checks given to other concerns had bounced in the early part of 1953?

A. I don't remember. [35]

The Court: Checks made payable to Swanson were not the only checks that bounced, were they?

The Witness: Not in the early part of 1953, your Honor. I mean as soon as Swanson cut off my credit I went to Willardson & Co. and Harris Produce and Great West which I used to do once in a while. I used to buy eggs from them. My credit was completely 100 per cent with them. I know my accounts

(Testimony of Manuel Delatorre.)

were pretty accurate as to the payments made to all these concerns from business done previously.

The Court: But you don't mean to say that the only checks that bounced were checks you gave to Swanson, do you?

The Witness: Well, there were other checks that did bounce but it was in the latter part——

The Court: But you said checks bounced when Mr. Bone was still alive.

The Witness: I think there was just a couple of cases, your Honor, that they did. I mean they weren't in the habit of bouncing.

Q. (By Mr. Obrand): Let me ask you this, Mr. Delatorre. Did you ever tell Swanson—C. A. Swanson & Sons, that you were insolvent?

A. No, I didn't.

Q. On July 3rd of 1953, did you report to Dun & Bradstreet that you were doing a volume of \$250,000 a year business and that you had a net worth of some \$16,000? [36]

Mr. McDonnell: Just a moment. I am going to object to that. This Dun & Bradstreet statement has just been handed to me. I have never seen it before, but I don't see in there any indication that \$250,000 a year's business was done. All right, I see it now.

The Witness: There had been in there—previously, about three or four times before that I gave them that statement and they were hounding me to—all the time Dun & Bradstreet were over there all the time, so I just made any report to them.

(Testimony of Manuel Delatorre.)

The Court: But you did make the report?

The Witness: Yes, your Honor.

Q. (By Mr. Obrand): And did you tell them at that time——

The Court: Doesn't the instrument speak for itself, counsel? Is that a signed statement or not?

Mr. Obrand: It is their regular report issued at the request of C. A. Swanson & Sons and sent to C. A. Swanson in the regular course of business.

The Court: You may proceed.

Q. (By Mr. Obrand): Now, you stated a moment ago that you went to Willardson & Co., I believe their name was. And who else did you go to see? A. M. E. Fond.

Q. Only when C. A. Swanson cut your credit off about June 12, is that correct? [37]

A. That is right.

Q. Isn't it true that you dealt with M. E. Fond for a year or two before that? A. Very little.

Q. When did you first start dealing with M. E. Fond in a measurable quantity?

A. Just about the end of that time.

Q. About when was that in months?

A. Well, I would say around May and June.

Q. And what was the amount of your purchases monthly from M. E. Fond and Company?

Mr. McDonnell: I object to that question. I think that is irrelevant. I don't see what this is accomplishing. I don't mean to be obstreperous, your Honor.

The Court: What is the materiality, counsel?

(Testimony of Manuel Delatorre.)

Mr. Obrand: To show that this man was continuing in business and was doing business and that the defendant had no reason to believe that he was insolvent.

That is our main issue here as to whether they had reason to believe he was insolvent. The fact that they cut down his credit or even cut it off doesn't mean to say he is insolvent. They just didn't like the way he was paying his bills.

The Court: I suppose there is no question that he continued in business for some time—that is up until the time [38] this bankruptcy proceeding was filed.

Mr. Obrand: Your Honor, I was laying a foundation for a question I am going to ask him with reference to the proceedings in the bankruptcy case.

I have the file here which as you recall is entirely different from what he is testifying to now.

The Court: Proceed.

Mr. Obrand: May I ask the reporter to repeat my last question?

The Court: Read the question, Mr. Reporter.

(Question read as follows: "Q. And what was the amount of your purchase monthly from M. E. Fond and Company?")

Q. (By Mr. Obrand): Will you answer that, Mr. Delatorre?

A. Well, I did not only buy eggs from M. E. Fond, but I bought eggs from others, too, at that time.

(Testimony of Manuel Delatorre.)

Q. Well, you also bought from Willardson, I believe you said?

A. That is right. And I bought some eggs from Harris Produce.

Q. Can you give us an idea of the average amount you purchased monthly from each of those firms during the months of June, May, June and July of 1953?

A. I would say it would be almost equivalent to the same amount I was buying from Mr. C. A. Swanson, from all [39] these other brokers.

Q. Now, prior to May how much did you buy from each of these concerns monthly?

A. It is pretty hard to remember back that far, sir.

Mr. McDonnell: Wouldn't the records themselves be the best evidence?

The Court: I was thinking the same thing.

Mr. Obrand: I was trying to avoid taking the time of looking them up—holding the court up while we were looking for those records, but I guess I will have to refer to them.

Q. Are you acquainted with the books which were kept in your business, Mr. Delatorre?

A. I am.

Q. Can you refer to your ledger and show me what was purchased by you during the second four months of 1953 from the concerns you mentioned other than C. A. Swanson & Sons?

A. Yes, I imagine we can get that.

(Testimony of Manuel Delatorre.)

The Court: Apparently a lot of eggs were involved.

Mr. Obrand: They are getting kind of stale by now. While we are waiting, your Honor——

The Court: We will take a five-minute recess at this time.

Mr. Obrand: May I make a statement that will probably save some of the court's time?

This question of a disputed payment as clarified by Mr. [40] Mulherin, appears on our records in two separate payments and on different dates. So, actually there is no dispute as to the amounts having been received. It is merely a question of dates and the ultimate question here as to reasonable cause to believe on the part of C. A. Swanson & Sons.

Mr. McDonnell: They were all received after the 29th of May, were they not?

Mr. Obrand: On the 29th and after. One portion of it was received on May 29th and the \$1,849 on June 12.

Mr. McDonnell: You say received. That was the date——

Mr. Obrand: That is the date they appear on our records. That is all I can tell you about that.

The Court: We will take a five-minute recess.

(Short recess.)

The Court: You may proceed, gentlemen.

Mr. Obrand: May I speak from here, your Honor?

The Court: Yes.

(Testimony of Manuel Delatorre.)

Q. (By Mr. Obrand): Mr. Delatorre, will you show me the ledger sheet for M. E. Fond?

A. Yes.

Q. And there is no indication on this to show the year when your purchases from them started?

A. It was in 1952.

Q. That is September 15, 1952, you started dealing with them, is that correct? [41]

Mr. McDonnell: The books speak for themselves, your Honor.

The Witness: That was when I bought a few merchandise from him—very little merchandise.

Q. (By Mr. Obrand): You started dealing with him in September, 1952, isn't that correct?

A. I have been off and on dealing with Swanson for the past 20 years.

Q. I am talking about M. E. Fond Company.

A. I mean from M. E. Fond. I have been in the egg business all my life. Here is when I started doing business—on the 5th.

Mr. McDonnell: May the record show the witness is pointing to a figure 5 and then a line and then the figure 12.

The Witness: That is when I started buying eggs from M. E. Fond heavily and the same thing with Harris Produce.

The Court: Were you doing business with them on a cash or credit basis?

The Witness: Credit business.

The Court: Always?

The Witness: Yes, sir. And the Harris Produce

(Testimony of Manuel Delatorre.)

—here is where I started doing business with them in 1953. I bought \$2,072.25 from them—the same thing as Mr. Willardson.

The Court: You bought that on credit?

The Witness: Yes, sir; and the Great West, too. I got [42] some—here it is right here. I bought \$1,339.25 on credit off of them, too.

The Court: When was the last time you bought from them?

The Witness: That was 1953, the 7th and 8th.

The Court: You bought that on credit?

The Witness: Yes, sir.

Q. (By Mr. Obrand): Now, this Willardson—when did you start buying from them?

A. Well, off and on. I was buying a few eggs off of them. When I started buying heavily from them—it started right in here, on the 5th and the 12th and it comes down——

Q. What year? A. 1953.

Q. Were you buying from them on credit?

A. Yes, sir. I mean my credit was open with them up to the 7th and July 9. That was my last invoice.

Q. As a matter of fact while you started buying heavily from these people you were still buying from Swanson, were you not? A. No.

Q. You mean to say you had no purchases in May from Swanson?

A. Well, I did but—I mean that was about the end of May when they suggested I buy my eggs some place else.

(Testimony of Manuel Delatorre.)

Q. Well, let me see. When did you start buying heavily [43] here? A. May 12.

Q. Well, on May 19 didn't you buy some \$1,900 worth from Swanson? A. Yes.

Q. And on the same day didn't you buy \$1,635 worth?

A. Well, I mean those eggs were bought before—I had some eggs bought from them. They used to get a car of eggs in for me and I used to take them as I went along.

Q. But you bought from them? A. Yes.

Q. And on May 14, five days before that, didn't you buy \$1,500 worth from them?

A. Yes. I mean the only way I could get eggs from them was to pay them and then they released some eggs to me.

Q. Let me ask you this question, Mr. Delatorre. Did your purchases, your entire purchases from all concerns start increasing in May over what they had been in the past?

A. No. They started dropping because I had to leave go a lot of my accounts on account of I wasn't getting enough eggs to sell them.

Q. Well, I have looked over the Swanson statement for the rest of 1953 and I don't see any purchases in any amounts much greater than you were purchasing in May.

Mr. McDonnell: If your Honor please, I think this is [44] irrelevant because the complaint does not allege reasonable cause to believe or any preferential payments prior to May 29, 1953, and—

(Testimony of Manuel Delatorre.)

The Court: I think it is to this extent, counsel. If other concerns were extending him credit and he was operating a business it might be an element to be considered.

Mr. McDonnell: Very well, your Honor.

Q. (By Mr. Obrand): How about farmers? Were you buying from them?

A. Yes, I was buying.

Q. Where is the ledger sheet for farmers?

A. We didn't keep any. I mean we just kept our sheets.

Q. You kept no ledger sheets from farmers?

The Court: You bought on a cash basis?

The Witness: Yes.

Q. (By Mr. Obrand): Where are your cash records on that?

A. They should be over there.

Mr. Obrand: Not being able to identify them may I ask the witness to pick them out?

The Court: What difference does it make if he paid cash?

Q. (By Mr. Obrand): Do you know approximately how much you were buying per month from farmers in the first five months of 1953?

A. It is pretty hard to say. I mean that is a long time ago. [45]

Q. Was it as much as you were buying from Swanson? A. No.

Q. Was it as much as you were buying from Fond?

(Testimony of Manuel Delatorre.)

A. No. You see the only reason that we went out and bought eggs——

The Court: Counsel, if you want to go into that you will have to get the books, but I don't think it tends to prove or disprove anything in this case. He paid cash for them. He went out and bought merchandise for cash.

The only materiality of this evidence, it seems to me, is that it might tend to establish that he was doing business and buying merchandise on credit, all of which he has already testified to. In other words credit was extended to him by others than Swanson.

Mr. Obrand: Of course that is in line with our contention in this case, that my clients had no reason to believe the witness here was insolvent at the time they were dealing with him and receiving payments from him.

The Court: But what he bought for cash doesn't prove anything other than to show that possibly he didn't have any credit. That is the only thing it would show.

Mr. Obrand: My reason for asking——

The Court: He wasn't paying cash for anything he could get on credit, apparently.

Mr. Obrand: Very well, your Honor. I will abandon that. [46]

Q. (By Mr. Obrand): Did you in June of 1953 tell Mr. Elmo Cross of C. A. Swanson & Sons when he was there, about a chattel mortgage that you were making better than \$1,000 a week for yourself?

(Testimony of Manuel Delatorre.)

A. No.

Q. You did not? A. No.

Q. At the time you signed the chattel mortgage did you tell Mr. Elmo Cross that you would be able to pay it off in 45 days?

A. You mean the balance that I owed him?

Q. Yes. A. I don't think so.

Q. Is it possible that you said that?

A. I don't think so.

Q. You knew you had signed the chattel mortgage, didn't you? A. That is right.

Q. Did you thereafter offer to give a chattel mortgage on the same fixtures and equipment to Willardson?

Mr. McDonnell: I object to that question. I think that is immaterial. I don't think what offers of chattels he made to Willardson has any materiality with relation to Swanson.

Mr. Obrand: Except to show the defendant here has been [47] misled and that the witness was making statements to, misleading statements, to them in an effort to make them believe he was insolvent.

The Court: Well, Willardson is not involved in this action.

Mr. Obrand: No, sir, but the general information throughout the industry, and we will connect it up with our testimony, the general information throughout the industry was that this man was merely in a financial bind for the time being, but that he had ample assets and it was a question of liquidating those assets to put himself in a better position.

(Testimony of Manuel Delatorre.)

The Court: That is a matter of proof. I don't think your question tends to prove or disprove that.

Mr. Obrand: Very well, your Honor.

Q. (By Mr. Obrand): Were you telling other people in the industry during the months of June and July that you were solvent—that you were keeping up your business and that you were doing a good business and improving it?

A. I don't think so.

The Court: You weren't telling everybody that you were insolvent, were you?

The Witness: Well, I couldn't do that very well, your Honor.

The Court: You put your best foot forward, didn't you?

The Witness: That is right, sir. [48]

Mr. Obrand: That is all, your Honor.

Mr. McDonnell: I have no further questions. May Mr. Delatorre be excused?

Mr. Obrand: Yes, as far as I am concerned.

Mr. McDonnell: On second thought maybe I had better keep him here for a while.

The Court: Call your next witness.

Mr. McDonnell: That is the case for the plaintiff, if the court please.

Mr. Obrand: If the court please, I would like at this time to make a motion to dismiss the complaint on the ground that the plaintiff has not met his burden of proving the two things that are necessary for the maintenance of this action.

First is the question—I should say three things. First is the question of payments within the prohibited period, within the four-months period from the time of the filing of the bankruptcy.

The Court: I thought that had been stipulated to—that these payments were made in the four-month period.

Mr. Obrand: He has to prove all three things. I submit that he has failed to prove all three of them.

Admittedly the payments were made.

Secondly the plaintiff must prove the insolvency of the bankrupt. The fact of bankruptcy itself is some proof and I don't think anybody is going to argue that the bankrupt [49] was insolvent the last two or three months of his existence in business. However, as far as we are concerned the main burden of proof on the plaintiff is to show that the defendant C. A. Swanson & Sons had knowledge of the insolvency or had reasonable cause to believe the bankrupt insolvent.

We submit, your Honor, that the plaintiff has failed to meet the burden of proof in that respect. All that he has shown to the present moment is that the bankrupt was insolvent; that certain payments were received.

He has failed to show that they had reason to believe the defendant—had reason to believe the bankrupt was insolvent.

There is still another facet to this type of proceeding, your Honor, and that is even if the defendant would have believed that the bankrupt was

insolvent and even though the payments were made within the prohibited period, there is still an out for the defendant if it can be shown that the preference was not more than the other creditors have received or would have received and that has not been shown, your Honor.

As far as the knowledge on the part of the defendant is concerned, the bankrupt himself has testified that he not only told them nothing of his insolvency but he made it a point to withhold that information from them and from the rest of the trade. [50]

I have heretofore submitted authorities to your Honor at your request, and based upon the authorities which I have cited I at this time make a motion for dismissal of the action.

The Court: The motion will be denied, counsel.

Mr. Obrand: Shall I proceed, your Honor?

The Court: Yes.

Mr. Obrand: Mr. Cross, will you take the stand?

ELMO CROSS

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Elmo Cross.

Direct Examination

By Mr. Obrand:

Q. Mr. Cross, what is your business or occupation?

A. I am assistant manager of C. A. Swanson & Sons, frozen foods.

Q. How long have you been in that capacity?

A. It will be three years this May.

Q. Were you working in that capacity in the early part of 1953? A. Yes, sir.

Q. And at all times were you in that capacity when your firm was dealing with Manuel Delatorre who was operating as the R & M Egg Farms? [51]

A. Yes, sir.

Q. Is there anyone other than yourself who handled the credit extension to Mr. Delatorre?

A. As far as issuing the actual credit, no. I gave the actual credit and worked with our credit manager on it.

Q. So that all those things were done under your direction and supervision? A. That is right.

Q. Did your company have a definite credit practice with respect to Mr. Delatorre whom afterwards we will refer to as the bankrupt?

A. Our credit terms with Mr. Delatorre had been on a two-week basis and he had been very prompt

(Testimony of Elmo Cross.)

with his payments up until the time of Mr. Bone's death.

A short time before that he finally got a little behind but most of the time it had been paid on the basis of every two weeks.

Q. And thereafter what happened?

A. After the time of Mr. Bone's death, well, checks—we had several checks come back and of course in the meantime we had been allowing merchandise to go along because his account had been good but after Mr. Bone's death, why, we called Manuel and he stated that her lawyer—his wife—Mr. Bone's lawyer had tied up his account and that was the reason the checks returned, which we believed and considered [52] could be the situation.

He said that in a period of two weeks after the time of his death, until he got it cleared, that he would pay off Mr. Bone's wife, approximately \$4,000, for her share of the business and to send the checks through again and they cleared.

Q. Did you make periodic checks with credit agencies for information on Mr. Delatorre and other customers?

A. Yes. It is the policy of our company—we belong to the Dun & Bradstreet and we ask for credit information at least once or twice a year from all the accounts we sell.

We also ask from the individual customer for a financial statement, if we can obtain one, which we did from Mr. Delatorre, but he never gave us one. He kept promising us one but never gave us one, so we relied on Dun & Bradstreet for our information.

(Testimony of Elmo Cross.)

Q. Did he ever give you any verbal information as to his assets or net worth?

A. Yes, he has.

Q. When was the first time he gave you any information on that?

A. Well, the first time we questioned him on it was at the time of Mr. Bone's death before any question came up. Like I said before, his payments had been prompt on a two-weeks schedule and at the time of Mr. Bone's death he said it was just a matter of a couple of weeks to get it cleared up [53] with the lawyer and everything would go along just like it had before. In fact he said he thought he could do a better business without Mr. Bone being there; that he had held him down and after that time, even in May and up into June when we were asking for payments on his account, he told us he was making as much as \$1,000 a week on his grocery store and egg account and it would be a matter of 45 days until he got our account cleaned up.

Q. Did you ever receive any information prior to receiving the notice of bankruptcy, to the effect that Mr. Delatorre was insolvent? A. No, sir.

Q. And the first information you had of that was the knowledge that he had become a bankrupt?

A. The first knowledge I had of it was the day after Mr. Fond and Mr. Willardson had gone down to his place and had pressed him for payment and taking the cash sales he received in the store that day they called me the next day and that was the first time I knew of it.

(Testimony of Elmo Cross.)

Q. Was there anyone else in your organization who could have received that information beside yourself? A. No, sir.

The Court: Who is the company you represent?

The Witness: C. A. Swanson & Sons.

The Court: Who are they? [54]

The Witness: Frozen food distributors, canned poultry products and frozen chickens.

The Court: They are processed here?

The Witness: No. This is a sales office.

The Court: Processed where?

The Witness: We have plants all over the United States. Most of our plants are in the midwest—Iowa, Nebraska and Minnesota.

Mr. Obrand: Your Honor, may I make an explanation? I am about to question the witness with reference to a Dun & Bradstreet report. I am only interested in one sheet, the sheet dated July 3, 1953.

We have here a collection of sheets representing the history of this bankrupt from Dun & Bradstreet but I would prefer to keep the file intact for my client's sake, and for the purpose of withdrawal later. Our only reference is to the sheet dated July 3, 1953.

Mr. McDonnell: Do I understand, Mr. Obrand, that you are offering these in evidence?

Mr. Obrand: I am. You are going to waive foundation.

Mr. McDonnell: I will waive foundation. Just offer them.

(Testimony of Elmo Cross.)

Mr. Obrand: Then I am offering it in evidence, your Honor, as a credit report from Dun & Bradstreet received by C. A. Swanson & Sons, represented by Mr. Elmo Cross, and done in the [55] regular and ordinary course of business after a request of Dun & Bradstreet.

The Court: It will be marked as an exhibit.

The Clerk: Defendant's Exhibit A in evidence.

(The document referred to was marked Defendant's Exhibit A, and was received in evidence.)

DEFENDANTS' EXHIBIT A

Dun & Bradstreet, Inc.

Rating Unchanged

5053—54x91

R & M Farms

OR 53 June 26, 1952

W & R Eggs & Dairy Products

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Robert D. Bone, Partner

J. Manuel Dela Torre, Partner

Rating: G 3½

Synopsis

Background: Partners started business December 1, 1951. One partner with Department of Agriculture 20 years; other in egg business fifteen years.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Net Worth: \$6,820.

Payments: Prompt.

Sales: \$15,000, monthly.

Condition & Trend: Cash and receivables cover debts. Volume increasing; provide partners living.

History

Partners registered trade style December 1, 1951; used general conduct of business.

Partnership formed, active operations commenced December 1, 1951; starting capital \$5,000 derived from savings.

Bone born in Illinois, 1886, married. 1931-51 employed, Department of Agriculture as Civil Service employee. Left that position to enter this venture.

Dela Torre, 37, married, born in Arizona. For past fifteen years has been employed by various egg companies, latterly with Holland Egg Products, Los Angeles, two years as salesman.

Operation—Location

Retails (25%) wholesales (75%) eggs and carries small line of dairy products. Wholesales to markets on 7-day terms; retail sales for cash, to local trade. 15 to 20 accounts carried, territory covers Los Angeles County. One employed.

Rents one-story stucco building located suburban business district. Space occupied measures 18 x 42 feet. Premises well kept.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Financial Information

Estimated financial condition at June 26, 1952

Assets

Cash in bank	\$ 2,000
Accounts Receivable	3,000
Merchandise (cost)	3,450
<hr/>	
Total current	\$ 8,450
Fixtures & equipment	750
Deposits	45
Prepaid expenses	75
<hr/>	
Total assets	\$ 9,320

Liabilities

Accounts payable	\$ 2,000
Owing on fixtures & equipment	500
<hr/>	
Total current	\$ 2,500
Net worth	6,820
<hr/>	
Total	\$ 9,320

Net sales, \$15,000 monthly. Salaries and drawings of owner, \$650. Net profit over and above salaries and drawings of owner, \$100. Monthly rent, \$75. Lease expires, November 30, 1952. Fire insurance on merchandise, \$2,000; fixtures, \$1,000.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Signed June 26, 1952, R & M Farms by Robert D. Bone, Partner.

Bone stated volume has increased substantially since operations commenced with present sales running \$15,000 monthly. Stated profits are small as they are selling on narrow margin in order to obtain new accounts. Monthly payments on fixtures and equipment, \$80.

Low four figure cash balance confirmed local bank; no loans requested.

Payments

HC	OWE P DUE	TERMS	June 26, 1952
3000	1500	Net 30	Ppt Sold 12-51 to date
2000	500	Net 30	Ppt Sold 6 mos.
500		Net 30	Ppt Sold 1-52 to date

6-27-52 (80 925) ONE W124

[Pencilled in margin]: 4/13/53—Fixtures (incl. trucks) worth \$7,000.00. Owe partner at death, \$4,000-\$4,500. Manuel's equity, \$4,500.00.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Dun & Bradstreet, Inc.

Special Notice

74—951

5053—54x91

R & M Farms

SN 53 April 6, 1953

W & R Eggs & Dairy Products

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Rating: (Investigating) G 3½

The following information is reported from a news item in: Los Angeles Times, Los Angeles, Calif., April 1, 1953.

Robert D. Bone, wholesale egg distributor, died on March 29, 1953. 4-6-53 (905).

[Stamped]: April 9, 1953.

* * *

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Dun & Bradstreet, Inc.

Special Notice

74—951

5053—54x91

R & M Farms

Hawthorne Egg Town

Dela Torre, J. Manuel, Owner

SN 53 July 31, 1953

Wholesale and Retail Eggs & Grocery

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Rating: (Investigating) F 31½

The following information is reported from public records:

Item: Chattel Mortgage #2460.

Amount: \$12,327.

Date Entered: June 15, 1953.

Mortgagor: (Borrower) J. M. Dela Torres
(R & M Farms), 1221 So. Hawthorne.

Mortgagee: (Lender) C. A. Swanson & Sons.

Property Covered: Certain fixtures and equipment.

Further Details:—

7-31-53 (905)

[Stamped]: Aug. 6, 1953.

* * *

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Dun & Bradstreet, Inc.

Rating Change

5053—54x91

R & M Farms

Hawthorne Egg Town

Dela Torre, J. Manuel, Owner

CD 53 July 3, 1953

Wholesale and Retail Eggs & Grocery

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Rating: F 3 to F 3½

Synopsis

Background: Started as partnership December, 1951; one partner died March, 1953, and present owner succeeded; previously employed same line over 15 years.

Net Worth: \$16,640.

Payments: Prompt to slow.

Sales: \$35,000, monthly.

Condition & Trend: Cash and receivables cover debt, but slow receivables have caused slowness in meeting trade obligations. Volume increased, profitable.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

History

Owner registered trade style, R & M Farms, April, 1953, used general conduct business. Style, Hawthorne Egg Town registered by Dela Torres and D. Bone, March, 1952, used principally advertising purposes. Has not been re-registered by present owner.

Business originally started as partnership between Dela Torre and Robert D. Bone, December 1, 1951, starting capital \$5,000 derived from savings. March 29, 1953, Robert Bone died and Dela Torre purchased Bone's interest from estate, approximately \$4,000 derived savings.

Dela Torre, born California, 1916, married. Has been in egg business most of adult working career, having been employed by various egg companies in selling capacity including Joe Feingold three years and latterly with Holland Egg Products, Los Angeles two years.

Operation—Location

Retails 25%, wholesales 75%, eggs and carry small line of groceries and dairy products. Wholesales to markets on 7-day terms, retail sales for cash to local trade. 45 accounts carried, territory covers Los Angeles County. Owner active, assisted by his family. No outside help employed.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Rents one-story stucco building located suburban business district. Space 18 x 60 feet, premises well kept.

Financial Information

Estimated financial condition at April 10, 1953

Assets

Cash in bank	\$ 4,000
Accounts receivable	14,000
Merchandise	8,000
<hr/>	
Total current	\$ 26,000
Fixtures & equipment	6,500
Deposits	140
<hr/>	
Total	\$ 32,640

Liabilities

Accounts payable	\$ 15,000
Owing fixtures & equipment	1,000
<hr/>	
Total current	\$ 16,000
Net worth	16,640
<hr/>	
Total	\$ 32,640

Net sales \$35,000 monthly; salaries and drawings of owners \$650; net profit over and above salaries and drawings of owners \$750; monthly rent \$140; lease expires 10 years.

(Testimony of Elmo Cross.)

Defendants' Exhibit A—(Continued)

Fire insurance on merchandise, \$6,500; fixtures, \$4,500.

Signed April 10, 1953, R & M Farms by J. M. Dela Torre.

July 3, 1953, Dela Torre, owner, stated volume for 1952 totaled \$250,000, or approximately \$20,500 monthly average and have continued to increase, until currently they are running \$35,000 monthly. Since operations commenced, he estimated volume has increased, 100%, retail sales are running about \$7,000-\$8,000 a month, with wholesale running \$25,000-\$30,000 monthly. Profits estimated at 4%. \$1,000 owing on fixtures and equipment payable \$55 a month.

Accounts receivable all stated to be current and collectable with exception of approximately \$5,000 which runs 14-21 over the normal terms.

Medium four figure cash balances confirmed at local bank, no loans requested.

Payments				
HC	OWE	P DUE	TERMS	April 10, 1953
10000	8500		N 30	Ppt Sold 1 yr. to date
5000	5000		N 30	Ppt Sold yrs.
2000	1500		N 30	Ppt Sold 1952 to date
				June 3, 1953
1100	655			Ppt Sold 11-51 to 5-53
155	102		Weekly	Ppt Sold 4-53 to date
19045	11900		N cash	Slow 7-21 Sold 12-51 to 5-53
17600	14241	10775	N cash	Slow 21 Sold 12-51 to 5-53
(5)			Cash	Our request
2500	950		Weekly	Sold 2-53
7-24-53 (48 939) (W125) (T)				

(Testimony of Elmo Cross.)

Defendants' Exhibit A—Continued)

Dun & Bradstreet, Inc.

Report—Special Notice

74—951 dup

R & M Farms

Hawthorne Egg Town

Dela Torre, J. Manuel, Owner

SN 53 December 10, 1953

Whole & Retail Eggs & Grocery

N

Hawthorne, Calif.

Los Angeles County

1221 So. Hawthorne Blvd.

Rating: — to N.Q.

As previously reported an involuntary petition in bankruptcy was filed against the business on August 20, 1953.

On September 9, 1953, Dela Torre was adjudicated bankrupt. Schedules listed liabilities \$39,266; assets \$15,610; exempt \$13,750; Case 57809, D. B. Head, referee.

12-10-53 (31 907)

* * *

(Testimony of Elmo Cross.)

Q. (By Mr. Obrand): Now on July 3, 1953, or within a few days afterwards, you still didn't know anything about any insolvency on the part of Manuel Delatorre, did you?

Mr. McDonnell: I object to that question. The witness is counsel's own witness. There is no sense putting the words in his mouth. Let him testify.

The Court: He already testified that he didn't know anything about insolvency until the insolvency was declared—until the bankrupt was declared insolvent.

Mr. McDonnell: That is right.

Mr. Obrand: I was asking a preliminary question because he has already testified to that, your Honor.

The Court: Is it necessary to ask a preliminary question in view of the fact that he already testified to it?

Mr. Obrand: Probably no, your Honor.

Q. (By Mr. Obrand): At the time you received payments—I can't ask that without first asking the witness if he received payments unless counsel will stipulate that we received those payments. [56]

Mr. McDonnell: We allege that they received the payments.

Mr. Obrand: I didn't want to ask the witness and be subjected to an objection on the ground of not laying a proper foundation.

Q. (By Mr. Obrand): You did receive payments in June and July from the bankrupt, did you not? A. Yes, sir.

(Testimony of Elmo Cross.)

Q. And those are the payments which we have admitted in our respective pleadings?

A. Yes, that is right.

Q. At the time you received any of those payments were you aware of any insolvency on the part of the bankrupt?

A. No, sir. At no time did we know he was insolvent until the time the boys told us on the last day.

Q. Were any of these checks—when these checks came back did that cause you to believe that the bankrupt was insolvent?

A. Will you repeat the question?

Q. When any of the checks came back did that cause you to believe or become concerned over the bankrupt being insolvent?

A. We were concerned naturally, on any checks returned but he always had a good answer for us which we believed, like the first time when Mr. Bone died. He said that the lawyer had tied up his account and the second time when the [57] checks came back he said to send them back and we did and the bank sent them back and he said the bank was holding his checks that he received from his customers and they had to clear before our checks went through and at no time did we know the checks didn't clear.

Q. Did you check with his bank on any occasion?

A. Did we check with his bank?

Q. Yes.

A. Not until the tail end of the deal when we

(Testimony of Elmo Cross.)

went to the bank and got a cashier's check from him.

Q. Did his bank give you similar stories with respect to the bad checks—that is similar to the ones Mr. Delatorre gave you?

Mr. McDonnell: To which I object as calling for a hearsay answer.

The Court: Did he make any inquiry of the bank? What their answer may have been is a different matter. As a matter of practice a bank wouldn't tell you anything about his account.

Mr. Obrand: That is what we are trying to bring out.

The Court: At least when I practiced law I could never get any information out of them.

Mr. McDonnell: Maybe C. A. Swanson & Sons can get more information than some of the attorneys, Judge.

Q. (By Mr. Obrand): Did you on June 12 or thereabouts [58] threaten Mr. Delatorre, for the purpose of getting a chattel mortgage from him?

The Court: That calls for a conclusion. Just tell what happened. Let him tell the story about the chattel mortgage.

The Witness: Your Honor, if I could—I think that would be better myself. Mr. Elliott and I, who isn't here, I am sorry to say, right now, was our credit manager and a year ago he was taken sick and contracted a disease, tuberculosis, and he is in Olive View Sanitarium.

Mr. Elliott and I at the same time worked with Mr. Delatorre in the sales and credit and Mr. Elliott

(Testimony of Elmo Cross.)

and I went out to Manuel's place at the time our account built up because of two or three checks that bounced and were returned from the bank. His account got higher than we wanted it to get and so to protect ourselves—in other words to go out and see how he stood, Mr. Elliott and I went out and looked over his business. He had a nice stock on his shelves and he had freezer equipment and a nice stock of eggs and he had trucks and candling equipment. He was very co-operative. He showed us the entire place. We asked how he was getting along and he told us that it was tough after Mr. Bone died but he was making money now and coming along swell.

We asked him if he had any objection to us taking a mortgage on his fixtures and equipment to protect ourselves for the amount of money which had gotten up through the bad [59] checks. We had no intention of letting his credit get that high. He said he had no objection and we asked him if there were any other mortgages on the equipment, which he stated there was not.

So, we listed the equipment, the freezers, the cabinets, the coolers, the candling benches and trucks and fixtures that he had and had him come in two or three days later and sign it.

We did not tell him he had to sign anything. He voluntarily went around with us at the same time Mr. Elliott and I were out there and we asked if we could look at his books. We did not go through

(Testimony of Elmo Cross.)

his books completely. We glanced through them to see what he owed other customers. We paged through his books, his accounts payable and they weren't too heavy and we went through the accounts receivable. I think at that time they were about \$10,000 or \$12,000. In our own minds after a rough sketch we figured his net worth if he had to liquidate would be \$14,000 or \$15,000 which convinced us that his mortgage was good.

We put him on a cash basis because we do that with all our accounts—anybody that gets into us too heavily we will put them on a cash basis until they get back on their feet when we give them credit terms again. That is the normal practice of business.

Q. (By Mr. Obrand): Did you during the month of July, [60] 1953, have correspondence with your main office with respect to the credit of Mr. Delatorre? A. I think we did.

Q. Was there at that time any of the correspondence which expressed any concern over the insolvency of Mr. Delatorre?

A. At that time our Omaha office or both agreed, probably agreed we were extending too high a credit, but at the same time in our letters we stated we felt the risk was good—that is payment was prompt until the time of Mr. Bone's death. We figured the account was good.

Q. Did you also in the regular course of your business ask for credit reports on your customers from the Credit Interchange Bureaus?

(Testimony of Elmo Cross.)

A. Yes, we have.

Q. I don't know whether it is called a "credit managers association" or "Credit Interchange Bureau." I will show you a sheet dated July 7, 1953, and ask you to identify it.

A. That is the report received from the Credit Interchange Bureau from our inquiry to them in regard to the Delatorre account.

The Court: What date was that?

The Witness: July 7, 1953.

The Court: Is there anything in that report indicating he was insolvent? [61]

The Witness: No. In the comment it says "improving his position."

Q. (By Mr. Obrand): And in your dealings with Mr. Delatorre were you relying on information which you received from the various credit agencies?

A. Yes, sir, that combined with the information that Mr. Delatorre gave us.

Q. And did you make inquiry from competitors as to whether they were dealing with Mr. Delatorre? A. Yes, sir.

Q. That was also your normal practice, was it not? A. That is right.

Q. And did you find out anything from your competitors which would cause you to believe that Mr. Delatorre was at any time—was insolvent during the months of May, June and July?

Mr. McDonnell: I will object to that. That calls for a hearsay answer by the witness, what the competitors told him.

(Testimony of Elmo Cross.)

The Court: Did you get any information from any of them to that effect?

The Witness: The information I got, your Honor, was after the time that Mr. Willardson and Mr. Fond were out to his place and they closed him up that day. That was the first information or any inkling we had he was in that bad shape.

The Court: Well, the bankrupt testified when you took [62] the chattel mortgage you told him you were going to put him on a cash basis.

The Witness: Yes.

The Court: And to buy from other concerns.

The Witness: Mr. Delatorre was buying from Farmers at the time and had been for years. In fact prior to that time—in other words he was buying direct from the farmers throughout the period he was in business and there were times prior to this time in that same year we were buying the surplus that he had, that he bought direct from the farmers and he was also buying from Fond, Willardson and other brokers.

The Court: Did you tell him to go buy from other people?

The Witness: No, sir. We put him on a cash basis. He could have come in and bought from us with cash, but the amount of credit he had built up through his bad checks and when we thought it was bad policy to issue more credit, when we got his balance down we would put him back on two weeks credit terms, which we do when an account gets out

(Testimony of Elmo Cross.)

of line or too high. You have to put them on a cash basis to reduce it.

When we put him on a cash basis and if he didn't have the cash he had to go to the other brokers to buy, probably.

Mr. Obrand: No further questions, your [63] Honor.

Cross-Examination

By Mr. McDonnell:

Q. Now let me see, Mr. Cross. Was Mr. Elmo the name of the man who went out with you that day? A. Yes, sir.

Q. To Mr. Delatorre's place of business?

A. Yes, sir.

Q. When was that, do you recall?

A. It was in June.

Q. What part of June?

A. The fore part of June.

Q. Was it around the 5th?

A. It could have been. I don't recall the exact day. It has been two years ago.

Q. You and Mr. Elliott went out that day?

A. Yes, sir.

Q. What did Mr. Elliott do in your organization, Mr. Cross?

A. Accountant and credit manager.

Q. And you, of course, supervised him?

A. He was under my jurisdiction.

Q. Did you set the credit policy or did he?

A. I did, working with him.

(Testimony of Elmo Cross.)

Q. You say he was the accountant?

A. Yes, sir. [64]

Q. Being his supervisor would you say he was an expert accountant?

A. He was a very good accountant.

Q. Wasn't he a public accountant?

A. He was not a C.P.A.

Q. But a licensed public accountant?

A. I think so, sir.

Q. And so far as you know pretty expert with a set of books? A. That is right.

Q. And he had been with your organization a number of years, had he?

A. He had been with us two years I think, a year and a half or two years.

Q. Did you have any reason to think he was inefficient or inaccurate in his work?

A. No, sir.

Q. You heard Mr. Mulherin and the other accountant testify this morning that the books showed on their face, after November, 1952, that this business was insolvent. Indeed the other accountant testified it was insolvent by more than \$10,000 at the end of March. Did you hear that?

A. That wasn't our books. They were Mr. Delatorre's books. Mr. Elliott did not make a complete audit of his books. [65]

Q. Did you hear the testimony this morning?

A. Yes, I did.

Q. Now, how long would you say Mr. Elliott worked on the books? A. On his books?

(Testimony of Elmo Cross.)

Q. Yes, on Mr. Delatorre's books that day.

A. He didn't work on them at all. He just glanced through the pages.

Q. But they were all there on the table for him to look at?

A. They were opened up to the accounts receivable and payable.

Q. Mr. Delatorre laid them down and said, "Here they are, go through them"?

A. What we had of them.

Q. And Mr. Elliott did go through them?

A. Paged through them. He didn't write down figures. He just paged through them.

Q. You mean he missed a \$10,000 insolvency condition? A. That is absolutely correct.

Q. And that was the same day you asked for the chattel mortgage, isn't that right?

A. That is right.

Q. When did you ask for it that day? Before or after Mr. Elliott looked through the books? [66]

A. We asked for it at the same time. We asked for the mortgage, I think, when we went out there and asked if we could page through the accounts receivable and accounts payable.

Q. You walked into the door and said, "We will take a chattel mortgage," is that what happened?

A. We went in and visited with him in the normal terms of business and we asked him the amount of—we asked him because of the amount of money we extended him and the amount of money

(Testimony of Elmo Cross.)

he owed us would he object to giving us a chattel mortgage.

Q. Do you usually take chattel mortgages on your accounts' equipment and fixtures?

A. We do if they get out of line, in the line of credit.

Q. How many other chattel mortgages did you take in 1953?

A. I didn't take any other in 1953 because we had no other trouble.

Q. How about 1954? Did you take any chattel mortgages in 1954? A. No, sir.

Q. This was the only one you took in two years' time?

A. That is right. As a matter of fact in 1954 we got out of the egg business. [67]

Q. Did you take an inventory?

A. We didn't take an inventory, no, sir.

Q. Who made the chattel mortgage up?

A. Who made it?

Q. Drew it up physically.

A. I think Mr. Elliott drew it up.

Q. Did Mr. Elliott go around and count the things that were in the store to put in the chattel mortgage—make a list of them? A. No, sir.

Q. Where did he get the list?

A. We took fixtures and not stock.

Q. That is what I mean. You went around and made a list? A. We checked the fixtures, yes.

Q. And the trucks?

A. Yes, and the candling equipment.

(Testimony of Elmo Cross.)

Q. Isn't it a fact you took every item in that store with the exception of the stock in trade and put it in the chattel mortgage?

A. I think so—anything that we saw that had any value.

Q. You were going to get yourselves in the position where you couldn't lose on this account, isn't that right?

A. We were trying to protect ourselves on the credit [68] we had given him.

Q. You were pretty far extended?

A. Yes, with the bad checks. Had the checks not returned our terms would have been right along the same as they had been.

Q. You have been telling us that your account was 15 days. Is that right or was it 30 days?

A. 15 days.

Q. Had it ever been 30 days?

A. With Delatorre it was 15 days all the way through.

Q. Could Mr. Elliott have made it 30 days without your knowledge?

A. It could have been extended out to 30 days but his terms were 15 days.

Q. You heard Mr. Delatorre testify this morning that around the 1st of May the credit period was cut, he said, from 30 to 10 days. Is that true or untrue? A. It was never 30 days credit.

Q. Was it reduced?

A. It could have been reduced from 15 days to 10 days.

(Testimony of Elmo Cross.)

Q. You are not sure of that?

A. That was two years ago.

Q. Would that have been within Mr. Elliott's jurisdiction, to cut it two weeks—two weeks to 10 days? [69]

A. It could have been either one.

Q. But Mr. Elliott could have done it, is that right?

A. It is possible. He would have told me and I would have told Mr. Delatorre. He would not have told Mr. Delatorre directly.

Q. Mr. Elliott didn't deal with Mr. Delatorre?

A. Not directly. I did the selling to Mr. Delatorre.

Q. When did the checks first start to bounce? In May, was it? Toward the beginning or toward the end of May?

A. If they bounced—right after Mr. Bone died—at the time of his death, like Mr. Delatorre said, his wife's lawyer tied up his account and at that time checks started bouncing.

Q. You were getting Dun & Bradstreet reports and checking credit information generally?

A. That is right.

Q. Why did you also make a check of his books if you had all these other sources of information?

A. Normal practice. If you are out there asking a man a simple question—we asked him for a financial statement which he promised to give us right along and never gave to us.

(Testimony of Elmo Cross.)

Q. Didn't that make you suspicious of what his financial statement might show?

A. It should have but we have had it happen time and time again. We never followed it [70] through.

Q. You know better now?

A. We know better now. We got out of the egg business. We have had too many experiences with it.

Q. Now, let me see. When you got these bad checks did you request that some other kind of check be given you? A. Those bad checks?

Q. Yes. You had been getting checks that came back because of not sufficient funds. Did you ask for certified checks?

A. We did after the first two or three times. The first time he told us to run them through—run the checks through again and we did and in another week or a period of 10 days they bounced back again and at that time we said: "Here, what is going on now. Everything is going to pieces."

And he gave a statement that the banks were withholding his money and not clearing his checks until the checks he got from the merchants had already cleared their banks and that was delaying it another five or 10 days. So he said he was going to change banks, which I think he did.

Q. Did you ask for certified checks?

A. After he changed banks and they bounced again we did.

Q. Then you knew for sure he was in trouble when they bounced from the new bank?

(Testimony of Elmo Cross.)

A. We didn't know he was in trouble but we knew the [71] checks were bouncing.

Q. But that is not the usual course of business with your dealers, is it—their checks bouncing two or three times from two or three banks?

A. It is not a normal course. We have had it happen in business and we have always had checks bounce and then put him on a cash basis and then restore him to credit a year later.

Q. You asked for cashier's checks?

A. Yes.

Q. And you got them?

A. We did get some cashier's checks. We also took his regular checks that were post-dated and put them through at a later date.

Q. After June 22nd, as a matter of fact, you got nothing but cashier's checks, isn't that right?

A. I couldn't tell you, sir.

Q. You just know that you got to the place where you wouldn't accept his checks?

A. No, sir; we took his checks at any time after that date. We continued to take his checks.

Q. How is it you got cashier's checks if you took any of his checks.

A. We took cashier's checks—in other words a check in the hand was better than no payment at all and Manuel's [72] word had always been good.

Q. Did you threaten to foreclose the chattel mortgage? A. No, sir.

Q. You were here in court when your attorney referred to this chattel mortgage this morning in a

(Testimony of Elmo Cross.)

discussion of this matter, as a whip to hold over the head of Mr. Delatorre?

Mr. Obrand: I object to that as being argumentative. I was just making a statement to the court. It was not testimony and it was not the words of this witness.

Mr. McDonnell: I didn't assume it was. I asked the witness if that was correct—that the chattel mortgage was held as a whip.

A. The chattel mortgage was taken strictly as a precautionary measure to protect the high amount of credit.

Q. (By Mr. McDonnell): Did you think he might not be able to pay the debt and you wanted something to foreclose on?

A. The day we looked through his books and took his inventory and started to make up the chattel mortgage we both made the statement that we were sure Manuel was in good shape—that he had had a little trouble before that.

Q. But you went right ahead and took the chattel mortgage anyway? A. That is correct.

Q. You were going to protect yourselves?

A. Naturally, wouldn't you? [73]

Mr. McDonnell: I have nothing further.

The Court: Is that all?

Mr. Obrand: That is all, your Honor.

The Court: Any further evidence?

Mr. Obrand: No further evidence on behalf of the defendant, your Honor.

The Court: We will take a recess until 2:00

o'clock, gentlemen, and I will hear whatever argument you have.

Mr. McDonnell: Would you prefer to hear the argument at 2:00 o'clock?

The Court: I don't want to hear it before lunch and I am not going to eat eggs either.

Mr. McDonnell: Before the plaintiff rests may I recall Mr. Delatorre for just one question?

The Court: Yes.

MANUEL DELATORRE

the defendant herein, called as a witness on his own behalf, having been previously sworn, was recalled and testified further as follows:

Direct Examination

By Mr. McDonnell:

Q. Mr. Delatorre, the plaintiff has alleged here and I think it is now substantially admitted, that after May 29, 1953, you paid to the C. A. Swanson & Sons \$12,267 on this account. [74]

Keeping in mind your other creditors, did any of your other creditors receive similar payments—not in that amount but percentage-wise on their accounts during that time?

A. They did.

Q. Did all of your creditors receive similar payments? A. Well, not all of them.

Q. There were some that did not receive as much? A. That is right.

Mr. McDonnell: I have no further questions.

(Testimony of Manuel Delatorre.)

Cross-Examination

By Mr. Obrand:

Q. And were the other creditors who received those payments in substantially the same position with respect to their accounts with you as C. A. Swanson & Sons?

Mr. McDonnell: Counsel, I don't understand that question. What do you mean by "substantially the same position"?

Mr. Obrand: That he was indebted to them and unsecured in a sizable amount.

The Court: You gave them checks for money you owed them?

The Witness: That is right.

Q. (By Mr. Obrand): And they received payments also in June and July?

A. Well, I don't think so. There was Harris Produce. I never even got a chance to give them a nickel or Great West Egg Company. [75]

Q. Didn't M. E. Fond receive substantial amounts in June and July?

A. Well, not exactly because I owed them more than I paid them.

Q. Well, I mean you gave them large payments in June and July, didn't you?

A. Not as big as I gave to Swanson. You can see it right there in the ledger.

Q. But you owed Swanson a lot more than you owed M. E. Fond?

A. Sure, but you couldn't give them that much. Where was I going to get the money from?

(Testimony of Manuel Delatorre.)

Q. Did you give the other creditors payments after you paid C. A. Swanson?

The Court: Aren't his records the best evidence of that?

Mr. Obrand: Yes, but counsel asked the general question and I was cross-examining in the same general vein. I have asked for the records. I presume, your Honor, that there will be no objection if we submit the bankruptcy file to this court as part of the evidence.

Mr. McDonnell: I think there will be. I mean the bankruptcy file is probably an inch or two inches thick. I don't know why all of it or a major part of it should be pertinent in this matter. [76]

Mr. Obrand: Except the court may examine any portion of it his Honor feels pertinent. I have no objection to his examining any part of it.

The Court: It is part of the records of this court.

Mr. McDonnell: I imagine the court can read any part he wants but I thought counsel was offering it in evidence.

Mr. Obrand: I am offering the file in evidence but it is not necessary when it is a part of the records of the court.

Mr. McDonnell: I just want to be certain if there is an appeal in this matter that we have a clear, clean record.

The Court: Well, I will give somebody grounds to appeal if you people can't settle this case. These cases are tragedies and the court isn't very sympathetic with this type of an action.

(Testimony of Manuel Delatorre.)

While I am fully aware that the bouncing of a check in itself is not evidence of insolvency but the courts have held that where checks have bounced it is sufficient evidence to support the court's findings, but they haven't found any decisions that hold that that in itself is sufficient. But this whole thing has a bad taste to it on both sides. I haven't any sympathy with the bankruptcy court giving money to pay attorney fees and the creditors get less and less and pay all the expenses involved. I don't like to take something away from somebody to give to somebody else.

While I have no objection to an attorney getting his fee [77] I don't like for him to get them at the expense of somebody else.

I will see you gentlemen at 2:00 o'clock and I think you should discuss some adjustment in this matter.

Mr. McDonnell: We will discuss it during the noon hour, your Honor.

The Court: It is going to work a hardship either way I decide it and while I realize the burden is on the plaintiff I will have no difficulty in deciding the case. And when I do neither one is going to be happy with it.

Mr. McDonnell: We will be back at 2:00 o'clock.

The Court: I think it would be better if you went out and had lunch together.

Very well, gentlemen, 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [78]

Wednesday, February 2, 1955; 2:00 P.M.

The Court: Gentlemen, pursuant to our discussion in chambers, I think I will take this case under submission. There is a factual question here.

I do feel, however, that I should have the benefit of counsel's comments in view of the evidence and the law that applies to the facts as they have been introduced.

I have had your points and authorities and I would like to have the benefit of your comments. I want to say this. I think, if counsel already doesn't know it, I am one of those individuals who can read better than I can listen. I am familiar with the evidence now, but I think I will let each of you file simultaneous briefs within 30 days and if there is any particular part of the evidence that you want to quote you will have to make arrangements with the reporter.

Mr. McDonnell: Thank you very much, your Honor.

The Court: I don't want any guesses as to what the testimony shows.

Mr. Obrand: Very well, your Honor.

(Whereupon at 2:10 o'clock p.m. the above-entitled matter was concluded.) [79]

Certificate

I, J. D. Ambrose, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of June, 1955.

/s/ J. D. AMBROSE,
Official Reporter.

[Endorsed]: Filed June 28, 1955. [80]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 59, inclusive, contain the original

Reply to Request for Admissions.

Answer.

Designation of Record on Appeal.

Supplemental Designation of Record on Appeal.

Notice of Appeal.

Order Extending Time for Filing and Docketing Appeal.

Complaint.

Findings of Fact and Conclusions of Law.

Interrogatories by Plaintiff.

Judgment.

Memorandum Opinion.

Minutes of the Court, dated Feb. 2, 1955;
Mar. 16, 1955; Mar. 25, 1955, and Apr. 11, 1955.

Motion for New Trial.

Names and Addresses of Attorneys.

Reply to Interrogatories.

Request for Admissions.

Statement of Issues.

Copy of Supersedeas Bond.

Stipulation and Order for Supersedeas Bond.

which, together with a full, true and correct copy of 1 volume of Reporter's Transcript of proceedings had on February 2, 1955, and the originals of Defendants Exhibit A, and Plaintiffs Exhibit 1, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in said cause.

I further certify that my fees for preparing the foregoing record amount to \$1.60, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this . . day of August, 1955.

JOHN A. CHILDRESS,
Clerk.

EDWARD F. DREW,
Chief Deputy.

[Endorsed]: No. 14,852. United States Court of Appeals for the Ninth Circuit. C. A. Swanson & Sons Poultry Company, Appellant, vs. William A. Wylie, Trustee in Bankruptcy for the Manuel Delatorre dba R & M Egg Farms, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 6, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,852

C. A. SWANSON & SONS POULTRY CO., etc.

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for
MANUEL DELATORRE dba R & M EGG
FARMS, Bankrupt,

Appellee.

STATEMENT OF POINTS, AND DESIGNA-
TION OF RECORD ON APPEAL

Appellant hereby designates the points on which it intends to rely, as follows:

1. In order that a payment by a bankrupt should operate as a preference, it must be shown that the bankrupt was insolvent, that the creditor had reasonable cause to believe the payment was intended as a preference, and that a preference actually resulted.

2. The burden is on the party seeking to set aside the transfer to show that all these conditions existed at the time the transfer was made.

3. The evidence presented to the trial court was insufficient to warrant a finding that a preference was created in favor of the appellant, in that

(a) Appellant introduced direct testimony, which was uncontradicted, that it had no knowledge of bankrupt's insolvency at the time it received the money;

(b) That although checks were being returned by bankrupt's bank, appellant was informed by both the bankrupt and the bank that confusion had resulted because of the death of bankrupt's partner;

(c) That appellant testified to having checked with various credit agencies and with its competitors, and had been informed that the bankrupt had sufficient assets, but was pressed for cash by reason of having to use his cash to pay off the interest of his deceased partner;

(d) That under date of two months after the alleged preferences were made, Dun & Bradstreet issued to appellant a report showing that the bankrupt was solvent and has a net worth of some \$17,000.00; that at the time of trial the bankrupt testified that he had given this information to Dun & Bradstreet for the information of his creditors, and that it was his intention to withhold the information that he was insolvent.

(e) That appellee, trustee in bankruptcy, introduced no testimony at the trial showing a knowledge of insolvency on the part of the appellant, merely arguing that the returned checks were sufficient to put the appellant on notice that the bankrupt was insolvent at that time.

Appellant hereby designates the following to be included in the record on appeal:

1. Transcript of the proceedings at the trial.
2. Complaint.
3. Answer to C. A. Swanson & Sons, a corporation.
4. Statement of Issues.
5. Interrogatories.
6. Answer to interrogatories by plaintiff.
7. Request for admissions.
8. Reply to request for admissions.
9. All exhibits.
10. Findings of Fact and Conclusions of Law.
11. Judgment.
12. Notice of Motion for New Trial.
13. Order denying Motion for New Trial.
14. Notice of Appeal.

Dated: August 17, 1955.

/s/ NORMAN A. OBRAND,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 18, 1955.

No. 14852

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. A. SWANSON & SONS POULTRY COMPANY,

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for the
Manuel Delatorre dba R & M Egg Farms, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

NORMAN A. OBRAND,

408 South Spring Street,
Los Angeles 13, California,

Attorney for Appellant.

FILED
MAY 1 1956
U.S. COURT OF APPEALS
NINTH CIRCUIT
LOS ANGELES, CALIF.



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No. 14852
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

C. A. SWANSON & SONS POULTRY COMPANY,
Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for the
Manuel Delatorre dba R & M Egg Farms, Bankrupt,
Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Pleading.

The within appeal is from a judgment in the District Court for the Southern District of California, Central Division, in an action under Section 60 (b) of the Bankruptcy Act brought by the Trustee in Bankruptcy to recover \$12,267.05 paid by the bankrupt to the appealing creditor within four months of the adjudication of bankruptcy; the Trustee alleging that at the time of the payments the bankrupt was insolvent, and that the appellant had reasonable cause to believe that the insolvency existed. [Complaint, p. 3, Record on Appeal.]

The answer admits the receipt of the payments, but denies that there was reasonable cause to believe that insolvency existed at the time the said payments were received. An affirmative defense of the extension of further credit was included in the answer, but upon the trial

it was shown to be a bookkeeping re-entry of an older item, rather than a new credit, and there was no issue on that point. [Answer, p. 6, Record on Appeal.]

At the trial the issues were narrowed down to the question of whether or not appellant knew or had reasonable cause to believe, at the time of receiving the payments complained of in this action, that the bankrupt was insolvent; and whether or not the said creditor knew, or had reasonable cause to believe, that any such payments would constitute a preference as against other creditors.

It is the contention of appellant that the evidence failed to prove that appellant creditor either had knowledge, or had reasonable cause to believe, that the bankrupt was insolvent at the time the payments were made.

Statement of the Case.

The undisputed evidence shows that the appellant is a wholesale egg distributor from whom the bankrupt had been buying merchandise for some two years prior to the adjudication of bankruptcy. That bankrupt had been fairly prompt in his payment until his partner died about March 29, 1953, at which time his checks commenced to return from the bank. Although the liabilities at that time exceeded the assets, a fact known to the surviving partner and his accountant, this was withheld from the public in general, and the appellant creditor in particular, and by a series of devious explanations for the returned checks and false information furnished to Dun & Bradstreet and other credit information agencies, the appellant and the other creditors of the bankrupt were lulled into believing that the business was sound but short of cash. As the checks were returned by the bank they were liquidated by the bankrupt.

During the middle of June of that year the appellant's credit manager became concerned over the large unpaid balance, in view of the returned checks, and in company with appellant's auditor visited the bankrupt's place of business, requested and received a chattel mortgage covering the fixtures and equipment, and informed the bankrupt that until his outstanding balance was reduced, his purchases would have to be on a cash basis. They glanced over the bankrupt's books and came away with the conclusion that he was financially sound, that "his net worth if he had to liquidate would be \$14,000.00 or \$15,000.00 which convinced us that his mortgage was good." [P. 90, Transcript.] This chattel mortgage was never recorded, and no claim therefor was presented in bankruptcy. On July 3rd the bankrupt reported to Dun & Bradstreet that he was doing a business of \$250,000 a year and had a net worth of some \$16,000.00. [See Tr. p. 57, and Deft. Ex. A, Tr. p. 75.] The instant action is to recover from the appellant the seven payments made by the bankrupt to the appellant within the four-month period, but before appellant had any actual knowledge of the insolvency of the bankrupt.

The only evidence with respect to the claim that appellant had reasonable cause to believe the debtor insolvent consisted of the returned checks. The Trustee in Bankruptcy contends that this is sufficient to have charged appellant with knowledge of the insolvency, or at least to have put the appellant creditor on notice. Appellant, on the other hand, contends that the slowness in pay was explained by a shortage of cash caused by the necessity of paying out the interest of the deceased partner in the business, and its inquiries from its competitors and the various credit information agencies convinced it that the bankrupt had a net worth of about \$15,000.00.

ARGUMENT.

In Order That a Payment by a Bankrupt Should Operate as a Preference, It Must Be Shown That the Bankrupt Was Insolvent, That the Creditor Had Reasonable Cause to Believe the Payment Was Intended as a Preference, and That a Preference Actually Resulted.

While subsequent events proved that the bankrupt was insolvent at the time the payments in question were made, it was definitely not shown that the appellant had cause to believe that the payments would result in a preference, nor was it proven that a preference actually resulted.

The bankrupt testified that his credit with appellant was allowed to continue until after he gave the chattel mortgage, which was dated June 12, 1953. [Tr. pp. 41, 48. See also Pltf. Ex. 1.] The record clearly shows that at least three of the payments—totalling \$6,120.26—were received prior to that date, namely, a payment of \$2,542.19 on June 5, one of \$1,632.00 received on May 29th but clearing the bank on June 10th, and a third one of \$1,945.35 received by Swanson's on May 22nd, but not cleared through the bank until June 22nd. [Tr. pp. 26, 34.] The testimony of the bankrupt was that he withheld knowledge of his insolvent condition from appellant and his other creditors in an effort to survive his financial crisis, and even went so far as to give misleading and false information to Dun & Bradstreet in furtherance of this effort. No evidence was presented by the Trustee to show any knowledge on the part of the appellant, or a reasonable cause to believe that the debtor was insolvent, except an attempt to create an inference from the slowness in paying bills, and the returning of checks.

Neither the fact that a debtor's accounts are past due, nor the fact alone of his financial embarrassment, is sufficient to impeach the good faith of a creditor in taking security so as to render the same voidable as a preference under the Bankruptcy Act, where there were circumstances which tended to explain such embarrassment upon grounds other than insolvency, *J. W. Butler Paper Co. v. Goembel*, 143 Fed. 295; *Arthur v. Harrington*, 211 Fed. 215. Here the debtor's statements to the creditors, and the report of the generally reliable credit agencies, was to the effect that the debtor was solvent but was experiencing difficulties in paying on time by reason of having to settle the claims of his deceased partner's estate.

In the case of *In re Wynne*, Federal Case No. 18,117, Chase 227, 9 Am. Law. Reg. NS 627, the court held that knowledge that a party is embarrassed in carrying out his business for want of means is not sufficient to fix on the grantee in a trust deed knowledge of his insolvency, if he fully believed that his property is more than sufficient to pay all his debts. Here appellant's credit manager and auditor in June prior to the adjudication glanced through the debtor's books and reached the conclusion that he had a net worth, even on liquidation, of about \$15,000.00. [Tr. p. 101.]

At no time during the trial was it brought out that appellant's receipt of these payments resulted in a preference, except for the hearsay statement and conclusion of the bankrupt, in response to a question by counsel for the Trustee, that during the period in question "not all" of his creditors received the same percentage of payments on their accounts during that time. [Tr. p. 102.]

The Burden Is on the Party Seeking to Set Aside the Transfer to Show That All These Conditions Existed at the Time the Transfer Was Made.

The bankrupt's insolvency and the creditor's reasonable cause to believe that a preference would result, must be proved as facts, *Chicago Car Equipment Co. v. Buell*, 211 Fed. 638. It is not enough to raise a question in the mind of the Court, but the burden is on the Trustee to prove it in the same manner that is required of any other factual issue. In the foregoing paragraphs we have shown that not only did the Trustee fail to show a knowledge or reasonable cause to believe on the part of appellant, but the evidence clearly points the other way. The bankrupt himself testified that he received credit, albeit on shorter terms, after several of the payments and up to the signing of the chattel mortgage on June 12. Mr. Cross, credit manager of Swanson's, testified that they had no inkling of insolvency until other creditors late in July took possession of the contents of the bankrupt's cash register. Both he and the bankrupt testified that throughout June and part of July the bankrupt was buying on credit from other suppliers and was reported to be doing a good business. Mr. Cross further testified that he was in touch with his competitors and received favorable reports as to the bankrupt's progress. The July 3rd report of Dun & Bradstreet indicated that the bankrupt's volume of business had increased and was profitable, that he had a net worth of \$16,640.00, and that he was past due in payment to only one creditor, presumably appellant.

The Evidence Presented to the Trial Court Was Insufficient to Warrant a Finding That a Preference Was Created in Favor of the Appellant.

As above stated, appellant introduced direct testimony, which was uncontradicted, that it had no knowledge of bankrupt's insolvency at the time it received the various payments. If it had no knowledge of the insolvency, it follows as a matter of course that it had no knowledge that the payments it was receiving would constitute a preference as against other creditors. To the contrary, it adopted this attitude in effect: "We have overextended ourselves on credit to you. Until you cut down the unpaid balance we will have to limit your credit and suggest that you buy elsewhere in the meantime." In the meantime they endeavored to reduce the outstanding balance. The trial judge, in overruling an objection of the Trustee [Tr. p. 65], took cognizance of the fact that it was material for the appellant to know that the bankrupt stayed in business and continued to get credit from others, in determining whether or not the appellant had reasonable cause to believe the bankrupt to be insolvent.

A bankrupt's inability to make payments on demand, while continuing business, does not imply insolvency, as regards recovery of preference, *Miceli v. Morgano*, 36 F. 2d 507; *McDougal v. Central Union, etc.*, 110 F. 2d 939; *In re Venie*, 80 Fed. Supp. 247. In the *McDougal v. Central Union* case, *supra*, the court said, "Although the bankrupt may act in bad faith and with a fraudulent purpose in mind, yet if the transferee is free of fraud and acts in good faith, and gives a present fair consideration in ex-

change for the transfer of property, the transaction cannot be set aside. *Payment of an antecedent debt is a fair consideration.*" (Italics ours.) There is no contention on the part of the Trustee that these payments were made for any other purpose than to reduce the antecedent debt of the bankrupt. As a matter of fact, the record discloses that even after the payment of the more than \$12,000.00 there still remained due to the appellant a balance of some \$5,000.00. The courts have gone so far as to say that where a bankrupt's transferee is merely a creditor accepting payment of an honest debt without knowledge that a preference will result or that the transferor was actuated by a purpose other than to pay the debt, the transaction cannot be set aside as a fraudulent conveyance, *though the debtor intended to defraud other creditors. Irving Trust Co. v. Chase Natl. Bank*, 65 F. 2d 409.

An examination of the testimony taken during the trial, all of which is printed in the transcript, indicates that the only possible basis for the finding that appellant had reasonable cause to believe the debtor insolvent was the mere fact that the checks were being returned by the bank. Counsel for appellant humbly begs to be excused for his constant return to this statement, but this conclusion is inevitable from an examination of any side of the case. The trial judge, in taking the case under submission, himself expressed doubt that evidence of "checks bouncing" would of itself support a finding that there was reasonable cause to believe that the debtor was insolvent. [Tr. p. 105.] Theoretically it is possible that he decided that the asking for and obtaining of a chattel mortgage constituted sufficient grounds for a suspicion in the minds of appellant's agents, yet it remains undisputed that appellant kept in constant touch with credit agencies

and with its competitors, and found no immediate cause for alarm. *A mere apprehension* on the part of the creditor, of the insolvency of his debtor, who subsequently becomes bankrupt is not equivalent to "good cause" to believe that insolvency of the debtor exists so as to permit the trustee to set aside a pledge by the debtor to secure the creditor as a preference, *Harrison v. Merchants Natl. Bank of Ft. Smith, Ark.*, 124 F. 2d 871; *Sec. First Natl. Bank v. Quittner*, 176 F. 2d 997.

We now come to the question of whether the appellant had reasonable cause to believe that a preference would result by the payments made to it by the bankrupt. The burden was upon the trustee to show this affirmatively, *Chicago Car Equipment Co. v. Buell, supra*. Mere incidental injury to bankrupt's creditors, resulting from a preference, does not make it void as a fraudulent conveyance, since there must be intent unlawfully to hinder creditors, *Irving Trust Co. v. Chase National Bank, supra*. If appellant, at the time it received payments on account, had no reason to believe that the debt would not be paid, the payments were not voidable, *Latrobe v. J. H. Cross Co.*, 29 F. 2d 210. Following out this doctrine we find that appellant believed the bankrupt to be solvent, that his volume of business was increasing, and that he was operating at a profit.

Where a debtor made a payment of \$2,500.00 on account to the creditor within four months of the date the debtor voluntarily filed bankruptcy, but before the creditor had knowledge of the debtor's insolvency, the debtor's trustee in bankruptcy could not subsequently recover the payment as an illegal preference, *Robie v. Myers Equipment Co.*, 114 Fed. Supp. 177.

Finally, where enough assets remain, after the transfer to one creditor, to give other creditors in the same class as great or a greater percentage of their claims, no voidable preference results, *Haas v. Sachs*, 68 F. 2d 623. This case is cited in connection with the testimony of the bankrupt at the trial herein that the other creditors were receiving similar payments at the same time. [Tr. p. 102.]

Conclusion.

From all of the foregoing, it is respectfully urged by appellant that there was no basis upon which the trial court could find that the appellant had reasonable cause to believe that the bankrupt was insolvent [Finding VI, Tr. p. 16], and, there having been no direct testimony on the subject, it could not have been found that the said payments enabled the appellant to obtain a greater percentage of payment on its debt than other creditors of the same class. [Finding VII, same page.]

Appellant, therefore, prays that the judgment of the lower court be reversed.

Respectfully submitted,

NORMAN A. OBRAND,

Attorney for Appellant.

No. 14852.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. A. SWANSON & SONS POULTRY COMPANY,

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for the
Manuel Delatorre, dba R & M Egg Farms, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for the
Manuel Delatorre, dba R & M Egg Farms, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

Statement of Facts.

In the "Appellant's Opening Brief", pages 2 and 3, appears a "Statement of the Case" which, no doubt, through inadvertence, fails to summarize before this court all the pertinent facts which appear in the record.

Manuel Delatorre operated a business known as the "R & M Egg Farms" [Tr. 40].

Originally, the business had been a partnership between Delatorre and Bone [Tr. 40] but on May 29, 1953 Bone died and the business was continued by Delatorre, individually.

Delatorre's principal supplier, both before and after the death of Bone, had been the defendant here, C. A.

Swanson & Sons Poultry Company, supplying about sixty per cent of the eggs for his wholesale operation [Tr. 41]. The eggs were purchased on a credit arrangement which, according to Delatorre, permitted payment thirty days after the eggs were purchased [Tr. 41]. Elmo Cross, the assistant manager of Swanson [Tr. 71], testified in contradiction that the credit terms had always been two weeks [Tr. 72].

After Bone's death, and perhaps before, Delatorre had given to the defendant a number of checks which were returned NSF [Tr. 47, 72].

About May 1, 1953, after a number of the checks had been returned NSF, the defendant reduced Delatorre's credit terms to ten days [Tr. 41]. This was done by the defendant at a meeting in the defendant's office at which time Elmo Cross stated, according to Delatorre, that "things didn't look so good, so that he was going to cut my credit down" [Tr. 42]. About June 1 [Tr. 42] Elmo Cross and Elliott, the accountant and credit manager of the defendant [Tr. 93], paid a visit to Delatorre's place of business. They went through Delatorre's books, all of which were made available to them. After inspecting the books, an inventory was taken of all the fixtures and trucks on the premises by Cross and Elliott who demanded of Delatorre that he execute a chattel mortgage to secure the indebtedness then due to the defendant [Tr. 42, 43]. This mortgage was prepared in the office of the defendant and a few days later Delatorre went there and signed it [Tr. 43]. This mortgage, dated June 12, 1953, is plaintiff's Exhibit 1 [Tr. 44, 45].

At the time of the meeting about June 1, 1953, the defendant stopped all credit sales to Delatorre and advised

him to go out and buy his eggs from other sources so that he could pay Swanson [Tr. 49, 50].

Also after the chattel mortgage was requested, defendant refused to accept any more checks of Delatorre and insisted on certified checks and cash [Tr. 47, 48].

As early as November 26, 1952 the books of the bankrupt, then a partnership, showed an insolvent condition in that the liabilities exceeded the assets by \$1,722.12 [Tr. 32]. At the time of Bone's death on March 29, 1953 an audit was made of the books of the partnership and it was determined that the business was insolvent with an excess of liabilities over assets of \$15,291.00 [Tr. 37], and this was a condition which did not improve after March 29, 1953 to the date of bankruptcy [Tr. 39].

Only two of the payments alleged in the complaint were ever questioned in this matter. One of them is a check given originally May 29, 1953 in the sum of \$1,632.00 [Tr. 34]. This check was presented for payment and on June 3, 1953 returned by the Bank of America to the defendant [Tr. 34]. On June 10, 1953 a new check on a new bank was drawn by Delatorre in the sum of \$1,632.00, was presented for payment on the same day and cleared the bank [Tr. 34].

The other item of payment about which some question has been raised is clarified by the undisputed testimony of Thomas Mulherin, a C. P. A., on page 35 of the record. This is an item of \$1,963.84. This was a check returned June 3, 1953. On June 22 a cashier's check was obtained from Delatorre's new bank in lieu of the original check for \$1963.84.

ARGUMENT.

Although it is not entirely clear from the appellant's opening brief, appellee apprehends that the appellant complains of the decision in this matter on the ground that the burden of proof as to three elements has not been sustained by the plaintiff: namely, the demonstration of insolvency, of reasonable cause to believe therein, and that a "preference actually resulted" (which no doubt refers to the requirement of Section 60a of the Bankruptcy Act that a preference occurs when payments are made which "* * * will * * * enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.")

Appellee proposes to examine each of the three requirements raised and contends that the burden of proof under the law has been amply sustained in each case.

I.

Manuel Delatorre Was Demonstrated to Have Been Insolvent at the Time of All Payments Here Sought To Be Recovered as Preferential.

It is not necessary to belabor the facts in the above matter since Appellant conceded that an insolvent condition existed. Appellee quotes from page 2 of the "Appellant's Opening Brief":

"That bankrupt had been fairly prompt in his payment until his partner died about May 29, 1953, at which time his checks commenced to return from the bank. *Although the liabilities at that time exceeded the assets*, a fact known to the surviving partner and his accountant, * * *." (Emphasis supplied.)

This statement is in accordance with the statement made by counsel for the appellant at the time of trial [Tr. 69]:

“Secondly, the plaintiff must prove the insolvency of the bankrupt. The fact of bankruptcy itself is some proof *and I don't think anybody is going to argue that the bankrupt was insolvent the last two or three months of his existence in business.*” (Emphasis supplied.)

Thus, it can be seen that the appellant itself now by its brief and its statement at trial has conceded the insolvency. If more was needed, the court's attention is directed to the testimony of the accountant for Delatorre, which indicates on page 39 of the record that on March 29, 1953 an insolvent condition of \$15,291.00 existed, which did not improve thereafter until the time of bankruptcy [Tr. 39].

II.

The Payments to Swanson Enabled It to Obtain More Payment on Its Debt Than Was Made to Other Creditors of the Same Class.

The court's attention is directed to the uncontradicted testimony of Delatorre appearing at page 102 of the record:

“Q. (By Mr. McDonnell): Mr. Delatorre, the plaintiff has alleged here and I think it is now substantially admitted, that after May 29, 1953, you paid to the C. A. Swanson & Sons \$12,267 on this account.

Keeping in mind your other creditors, did any of your other creditors receive similar payments—not in that amount but percentagewise on their accounts during that time? A. They did.

Q. Did all of your creditors receive similar payments? A. *Well, not all of them,*

Q. *There were some that did not receive as much?*
A. *That is right.*" (Emphasis supplied.)

On cross-examination, Delatorre reiterated the evidence on direct examination. Delatorre indicated that there was at least two of his creditors to whom he never paid a penny [Tr. 103]:

"Q. (By Mr. Obrand): And they received payments also in June and July? A. Well, I don't think so. *There was Harris Produce. I never even got a chance to give them a nickel or Great West Egg Company.*" (Emphasis supplied.)

In view of the foregoing uncontradicted testimony, appellee contends that no other conclusion would have been possible to the trial court other than the one it reached: that the payments to Swanson enabled it to secure a greater percentage of payment on its claim against Delatorre than were received by others of his creditors.

III.

The Appellant Had Reasonable Cause to Believe That the Debtor Delatorre Was Insolvent When It Received Payments on the Antecedent Debt Totaling \$12,267.05.

A careful reading of both appellant's brief here and the record made at the time of trial will indicate that the main contention in this matter has always been that the appellant did not know Delatorre was insolvent until bankruptcy was filed and never had reasonable cause to believe that he was.

With this contention of the appellant the trial court disagreed, finding [Tr. 5]:

"That on May 29, 1953, and at all times thereafter, defendants, and each of them herein, had rea-

sonable cause to believe that the bankrupt, Manuel Delatorre, was insolvent.”

Let us be clear at once that it is not incumbent on the plaintiff to demonstrate that there was actual knowledge of insolvency. Remington on Bankruptcy, 5th Ed., puts the matter this way in Section 1709:

“The trustee need not prove absolute knowledge, but only such circumstances as would lead an intelligent and prudent business man to entertain the belief that the transfer would give him a preference over other creditors. * * * Direct evidence may be unobtainable. But this is not essential. The creditor comes within the inhibition where the substantial facts are of such significance as fairly to warrant the inference that he knew or ought to have known of the bankrupt’s financial condition.”

The existence of “reasonable cause to believe” is a question of fact. The leading case is *Kaufman v. Tredway*, 195 U. S. 271, 49 L. Ed. 190, 25 S. Ct. 33, wherein Mr. Justice Brewer said:

“Whether the bankrupt was insolvent on August 4, 1898, when he paid the money to his brother, the defendant, and whether the latter had reasonable cause to believe that it was intended thereby to give a preference are questions of fact determined by the verdict of the jury and not open to review in this court.”

See also to the same effect *Pyle v. Texas Transport Co.*, 238 U. S. 90, 59 L. Ed. 1215, 35 S. Ct. 667.

The trial court’s determination of the factual question of “reasonable cause to believe” should not be disturbed unless clearly erroneous. That rule was laid down by

this court in *Security First National Bank of Los Angeles v. Quittner* (C. C. A. 9th, 1949), 176 F. 2d 997, 999:

“But where the evidence is such that different conclusions are warranted, the determination of the question here involved is essentially one for the trial court. For even where there is no doubt or controversy as to what facts came to the attention of the creditor, the question as to whether he acted reasonably in making no further inquiries, in short, whether he had reasonable cause to believe the debtor insolvent, is generally a question of fact. * * *.

“And if the evidence here be not such as to require us to find the trial court’s findings clearly erroneous, we must accept that court’s conclusion. Federal Rules of Civil Procedure, Rule 52(a), 28 USCA.”

A review of *all* the evidentiary facts which the trial court had before it cannot fail to impress, appellee feels, that its conclusion that appellant had “reasonable cause to believe” was not only not erroneous but the only correct conclusion which could have been reached.

Firstly, there is the matter of the inspection of Delatorre’s books. After appellant had had several months of difficulty collecting its growing account with Delatorre, after Delatorre’s checks had been repeatedly returned NSF, after a change in credit terms between appellant and Delatorre had become necessary, after repeated requests for a financial statement had been ignored, at last the manager and his bookkeeper, Elliott, a trained and licensed public accountant [Tr. 94], came to inspect Delatorre’s books.

Delatorre made available to them all of his books and Elliott and his superior, Elmo Cross, went through them.

The testimony of the witness Cross taxes the credulity of the appellee for at page 90 of the record he indicates that he and Elliott came to a "rough sketch" of a net worth for Delatorre at the time of the inspection of his books in early June, 1953 of fourteen or fifteen thousand dollars. An actual audit of the books by Raymond Creal, the bookkeeper for Delatorre, made at the end of March, 1953 showed an excess of liabilities over assets of \$15,291.00. It is incomprehensible to the appellee how a trained accountant, such as Elliott was, could have inspected the books which, according to Creal, were in substantially the same condition as at the end of March, and misjudged the net worth of Delatorre by as much as \$30,000.00.

In this connection, Appellee calls to the court's attention that no effort whatsoever was ever made by the defendant to either produce Elliott or take his testimony and present it to the court on this matter.

Where a creditor is led to make an inquiry as to the actual financial condition of his debtor, he is charged with what that investigation shows, or would show if it were pursued far enough and is therefore chargeable with reasonable cause to believe if the investigation would have revealed insolvency. See *In re Talbot Canning Corp.* (D. C. Md., 1941), 39 Fed. Supp. 858, Rvsd. on other grounds in 125 F. 2d 683.

Appellee contends that when a trained accountant was brought to inspect the books of Delatorre, the appellant cannot now hide behind mistakes which he may have made or the results of a cursory examination. The books were there for the appellant to examine; they were examined by a trained accountant and this charges the appellant with the knowledge of the insolvency of Delatorre which those

books, according to the uncontradicted evidence, had shown for many months.

The second item which the trial court no doubt had in mind was the taking of the chattel mortgage in this matter. While the taking of a chattel mortgage alone may not be determinative, certainly it is a very important factor. The matter is put most strongly in a case decided in the United States District Court of Maine, *Matter of Kents, Inc., Bankrupt*, 9 Fed. Supp. 216. In that case a chattel mortgage was given within four months of bankruptcy to secure an antecedent obligation to a creditor. It is significant for our purposes here that it was given after a check had gone unpaid at the bank. The court was most emphatic in sustaining the element of "reasonable cause to believe", saying:

"The attorney for the petitioner relies upon a financial statement and the amount for which the property in question was carried on the books of the bankrupt, but a creditor cannot rest on those things alone, where, as here, through his agent and attorney, he knows other facts inconsistent therewith, and especially where he takes a chattel mortgage covering all the stock in trade, tools, and equipment of a small retail business. *That fact alone is sufficient to put him upon inquiry. It is out of the usual course of business, and is evidence of the desperate situation by a mortgagor who does it as a last resort, after his credit is gone, necessarily knowing that it will be close to the end of his financial career.* Many cases, some of them cited by counsel appearing for the trustee, amply bear out this statement. Numerous cases are cited in *Remington* under Section 1919. See also *Pollock v. Jones* CCA 4th) 124 F. 163." (16) (Emphasis supplied.)

The same rule of law was applied in *In Matter of Marcella Chocolate Company* (U. S. D. C. Mass.), 2

A. B. R. (N. S.) 846. The court finding at page 847 of 2 A. B. R. (N. S.):

“A mortgage like this carried for practical purposes is its own presumptive notice of insolvency * * *.”

See also to the same effect:

Pierre Banking and Trust Co. v. Adolph Winkler
(S. D. S. Ct., 1917), 40 A. B. R. 622;

In re Brayton (D. C. N. D. N. Y., 1922), 276 Fed.
1020;

In re Clark (D. C. Mich., 1926), 11 F. 2d 540.

The foregoing cases apply most forcibly here. Consider that after a period of financial difficulties between the appellant and Delatorre, after the books have all been inspected, after checks have been repeatedly returned NSF, some of them more than one time, the appellant goes to the place of business of Delatorre, takes an inventory of all of his mortgagable property and insists on this as security for its very substantial claim. What other purpose could there be for such conduct than to protect itself from the possibility that Delatorre would fail and be unable to pay his obligations in full?

In this connection it is also significant to note that the chattel mortgage, which was designated by the counsel for appellant to be a “whip” held over the head of Delatorre, was never recorded. The logical inference to be drawn from such conduct is that the appellant must have known that the recordation of such a chattel mortgage would become known to the general business community and hence to Delatorre’s other creditors, of whom appellant had full knowledge after inspecting the books. The court can imagine the rapidity with which Delatorre’s operations would have been terminated had other creditors

gotten wind of such an attempt to protect themselves on the part of the appellant.

Appellee insists that the taking of the chattel mortgage is ample indication, even by itself, that the appellant either knew of the dilapidated financial state of Delatorre's business or that they had grave suspicions thereof. Either is sufficient to constitute "reasonable cause to believe".

Counsel for appellant has disregarded all of the foregoing items and chosen to represent to this court that the only basis on which the trial court proceeded was the number of checks which had been returned unpaid to the appellant. Without doubt, this was an important consideration to the trial court, but the foregoing indicates that there were other important factors present.

As to the matter of the checks returned NSF, there have been a number of cases which indicate the importance of this factor.

The United States District Court of Minnesota decided the case of *Robie v. Myers Equipment Co.*, 114 Fed. Supp. 177 in 1953. The case involved substantial payments made by a television retailer to a jobber on an antecedent indebtedness. Part of the proof was that a \$5,500 check had been deposited and returned NSF. On this phase of the case the court said:

"Mere suspicion that a preference is being effected is admittedly insufficient. *Knowledge of dishonored checks* and like information, however, is evidence tending to show reasonable cause for belief in that respect, and charges the creditor with notice. Citing *Brown Shoe Co. v. Carns* (CCA 8th) 65 F. 2d 294; *Canright v. General Finance Corporation* (CCA 7th), 123 F. 2d 98; *H. D. Lee Co., Inc. v. Bostian* (CCA 8th), 187 F. 2d 942." (Emphasis supplied.)

A similar conclusion has been reached by the United States District Court of Pennsylvania in the case of *Eisnagle v. Blank*, 125 Fed. Supp. 390. In that case, checks had been repeatedly returned to Edward Blank & Sons, the defendants. They would put the checks through again at the request of the bankrupt, Schroeder Shoe Co. (Similar to the procedure here.) After several of these checks had been returned, the agent for the defendant went to the Schroeder Shoe Co. and insisted upon a substantial cashier's check to cover the outstanding NSF checks, refusing a further check from the Schroeder Shoe Co. (The parallel to the facts in this case is striking; the checks of Delatorre had "bounced" and after June 1 and the chattel mortgage, the appellant would no longer accept his individual checks but wanted cashier's checks or cash.) The court at page 394 of 125 Fed. Supp. said:

"I am of the opinion that the evidence establishes that at the time Lester Blank collected the checks in question he had reasonable cause to believe that the financial condition of Schroeder Shoe Co. was precarious and that the company was at that time insolvent. *He knew that certain checks which he had received were unpaid because of insufficient funds. While in the aggregate the sum total of these unpaid checks was not a large amount, it was direct notice to him of the company's financial difficulty.*" (394) (Emphasis supplied.)

While the NSF checks in this case standing entirely alone may or may not have been sufficient to support the findings of the trial court, certainly, when coupled with the chattel mortgage, the cessation of credit extension, the examination of the books, the demand for cashier's checks and cash, the effect of the returned checks must be to buttress the finding of the trial court.

Appellee cannot close this brief without commenting on the principal defense to the foregoing facts which appellant continually attempts. The evidence shows without contradiction that a false financial statement had been given by the bankrupt to Dun & Bradstreet and had come to the hands of the appellant, although the time when it was received is not entirely clear. This statement did not reveal the long-standing insolvency of Delatorre. Appellant now continually returns to these financial statements in insisting that it did not have reasonable cause to believe.

Without deprecating the services of so well known and efficient organization as Dun & Bradstreet, appellee submits that a creditor cannot focus all of its attention on only one factor in determining the financial condition of one of its debtors: all the facts must be taken into consideration. And if those other facts are in contradiction to the information supplied by a financial statement, no matter what its source, then a creditor cannot insist blindly upon a state of mind founded only on that financial statement.

Such a conclusion is indicated by the Court of Appeals for the Eighth Circuit in the case of *H. D. Lee Co., Inc. v. Bostian*, 187 F. 2d 942. In that case a contention similar to that made here was made by a creditor. In response thereto, the court said at page 944 of 187 F. 2d:

“In support of their contention that the trial court erred in finding that the bankrupts were insolvent at the time the payments were made, both defendants rely heavily upon the confidence they placed and insist they were entitled to place in Dun & Bradstreet reports made by James B. Carter * * * in which James B. Carter showed a partnership net worth of \$8,150.00 in January, 1947 and of \$14,050.00 in January, 1948. * * * *Without minimizing the*

value of such reports as evidence in bankruptcy proceedings or for other purposes, they must be considered in connection with all of the other evidence bearing upon the question of solvency, knowledge thereof, or reasonable grounds for knowledge thereof. And if in the evidence as a whole there be found reasonable support for the trial court's findings, those findings must stand." (944) (Emphasis supplied.)

Conclusion.

Appellee contends that it has demonstrated at the time of trial to the satisfaction of the trial court all of the elements necessary to avoid a preference to a creditor. He has shown the insolvency of Delatorre, the making of payments to the appellant within four months, that the payments were on an antecedent obligation, that the effect thereof was to permit the appellant to receive more payment on its debt than was received by other creditors of the same class. And, finally, that the court's determination of "reasonable cause to believe" is well and broadly supported by the evidence in this case. The entire course of conduct of the appellant in this case is indicative in the strongest terms of one who either actually knew, or had so many items to arouse suspicion as to be charged with the knowledge of the insolvency of the bankrupt.

Respectfully submitted,

CRAIG, WELLER & LAUGHARN,

By C. E. H. McDONNELL,

Attorneys for Appellee William A. Wylie.

FRANK C. WELLER,

C. E. H. McDONNELL,

THOMAS S. TOBIN,

Of Counsel.



No. 14852

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. A. SWANSON & SONS POULTRY COMPANY,

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for the
Manuel Delatorre dba R & M Egg Farms, Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

NORMAN A. OERAND,

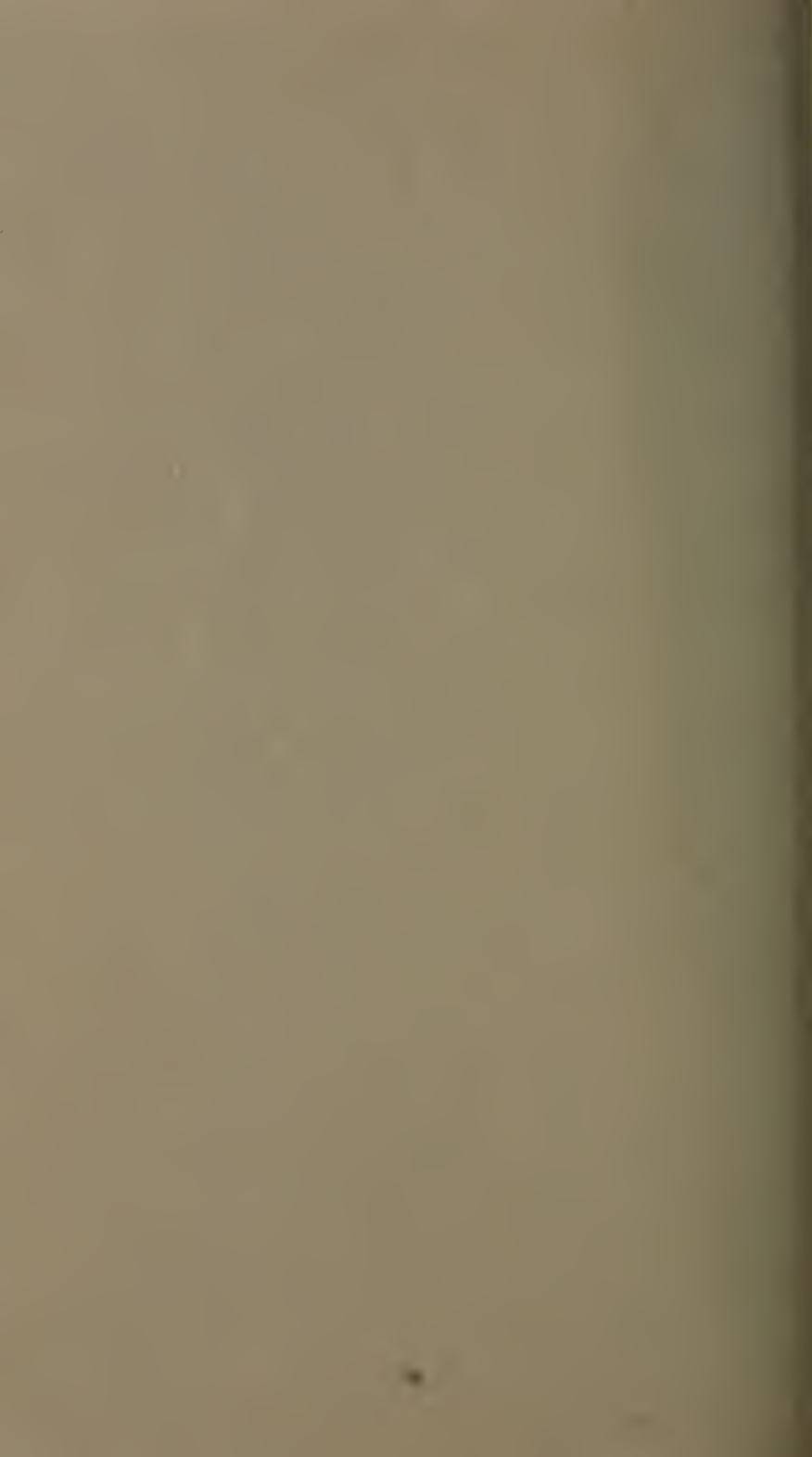
408 South Spring Street,
Los Angeles 13, California,

Attorney for Appellant.

FILE

MAY 18 1950

PAUL P. O'BRIEN, C



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No. 14852

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

C. A. SWANSON & SONS POULTRY COMPANY,

Appellant,

vs.

WILLIAM A. WYLIE, Trustee in Bankruptcy for the
Manuel Delatorre dba R & M Egg Farms, Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

Disputed Facts.

Since a case of this kind is largely decided on the evidence, each item adduced at the trial becomes important to the decision. On this theory is predicated the first portion of Appellee's Brief—labeled "Statement of Facts"—and for this reason does the appellant hereinafter call this Honorable Court's attention to various portions of the aforementioned Statement of Facts. Appellant will endeavor to maintain some semblance of continuity by referring point by point to the disputed portions as they appear in Appellant's Brief.

While it is doubtful whether or not the credit terms extended to the bankrupt prior to May 1, 1953, were on

the basis of 30 days, or two weeks, the appellee has placed some emphasis on the matter. Mr. Elmo Cross, assistant manager of the defendant supplier, and in charge of credit arrangements, clearly insisted that at all times up to about May 1, 1953, the credit extended to the bankrupt was on a two-week or 15 day basis. [Tr. 92.] Mr. Cross then testified that, in accordance with the customary practice of his company, and in line with the general practice, the bankrupt was put on a cash basis, when several checks were dishonored and the unpaid balance exceeded their predetermined credit ceiling, until such time as the bankrupt "got back on his feet." [Tr. 90, 100.]

Although the bankrupt testified that when he was called in to the office of the defendant in May, Mr. Cross said "things didn't look so good," the testimony of Cross refutes it. He stated that when the credit exceeded a certain amount, they put the defendant on a cash basis. Even the bankrupt stated that after May 1st, when the alleged statement was made, his credit was "cut down" but was not cut off until the chattel mortgage was given. It appears more than unlikely that the defendant would continue to extend credit after finding that "things didn't look so good." On the contrary, at the bottom of page 89 of the Transcript, after the defendant's representative had arranged for a chattel mortgage, we find the following: "We did not go through his books completely. We glanced through them to see what he owed other customers. We paged through his books, his accounts payable and they weren't too heavy and we went through the accounts receivable. I think at that time they were about \$10,000 or \$12,000. In our own minds after a rough sketch we figured his net worth if he had to liqui-

date would be \$14,000 or \$15,000 which convinced us that his mortgage was good.”

Upon cross-examination Mr. Cross again said: “The day we looked through his books and took his inventory and started to make up the chattel mortgage we both made the statement that we were sure Manuel was in good shape—that he had had a little trouble before that.” [Tr. 101.]

In appellee’s statement of facts it is insisted that defendant refused to accept any more checks of bankrupt, and that defendant thereafter insisted on certified checks and cash; yet on cross-examination the bankrupt admitted that he had probably given the defendant ordinary checks. [Tr. 50.]

Argument.

It appears to be admitted by both parties to this cause that the controlling factor here is whether the defendant knew, or had reasonable cause to believe from the facts available to it, that the bankrupt was insolvent at the time the payments were made to defendant. The fact alone that the debtor actually was insolvent at the time, or that a preference actually resulted, is not sufficient grounds to recall those payments. The burden is on the trustee in bankruptcy to prove these points as facts, *Chicago Car Equipment Co. v. Buell*, 211 Fed. 638.

The trustee’s claim to having sustained the burden of proof in this connection rests upon the following testimony only: (1) checks issued by the debtor to the defendant were being returned by the bank; (2) defendant in June of 1953 asked for and obtained a chattel mortgage from the bankrupt; (3) about May 1st of 1953, the

debtor was called in to the office of the defendant and, according to the testimony of the bankrupt, defendant's credit manager stated to him that "things don't look so good," and cut down defendant's credit to the bankrupt; (4) as early as November, 1952, the books of the bankrupt showed an insolvent condition, which did not change substantially thereafter; and (5) about June 1, 1953, Mr. Cross and Mr. Elliott, representatives of defendant creditor, had the bankrupt's books in front of them and should have seen the insolvent condition of the business. We will attempt in the following paragraphs to discuss the individual points.

(1) While the creditor here was concerned over the fact that checks were being returned by the bank, this concern was more as to the increase in the outstanding balance beyond their normal credit extension to the debtor, rather than a suspicion that he might not be able to pay. The appellant's office was concerned, but the bankrupt and his bank had ready and plausible explanations, and other circumstances such as credit reports, the continued increase in the bankrupt's volume of business, the constancy of his purchase of merchandise whether from the appellant or otherwise, militated against the appellant's acquiring any suspicion that the bankrupt was not telling the truth, and caused them to believe that he was solvent with a net worth of some \$15,000.00, but was in the process of paying off the estate of his deceased partner, and was pressed for cash. [Tr. 90, 101.]

It is urged by appellee that the dishonoring of checks after the death of the bankrupt's partner should have caused the Swanson people to feel that the bankrupt's financial condition was bad, yet the record shows that even before the partner's death a check "bounced" now

and then. [Tr. 50, 57.] As stated above, these were explained away by plausible excuses, and the bankrupt would make prompt payments in between the bad periods.

One reasonable method of determining whether or not a creditor believes his debtor to be insolvent is to examine the relations between them. In the instant case, the record shows that for several months after checks were first returned, the appellant extended credit to the bankrupt, at least up to June 12, 1953, when they asked for and obtained the chattel mortgage. [Tr. 58.] It would be incongruous to believe that a creditor would extend further credit to a person, already substantially indebted to it, when there was reason to believe that the person was insolvent.

Appellee cites the case of *Eisnaugle v. Blank*, 125 Fed. Supp. 390, in support of his position, but an examination of that case reveals that although returned checks were likewise involved in that case, the creditor was possessed of other information which the Court held should have caused him to question the solvency of the bankrupt. The same applies in the case of *In re Talbot Canning Corp.*, 39 Fed. Supp. 858, cited by the appellee. In the latter case the evidence adduced the fact that prior to the payments there had been discussion between the debtor and creditor about the possibility of a receivership.

(2) We come now to the question of the chattel mortgage given to the appellant on June 12, 1953. Attention is respectfully called to the fact that as and when payments were thereafter received, the creditor did not credit them as payments on the mortgage, nor was the mortgage ever recorded. [Tr. 52.] The mortgage was only incidentally involved in this action, and it would seem

that the only reason appellee refers to it is to infer that at the time of its execution the creditor believed the bankrupt to be insolvent. When two or three checks were returned unpaid and the bankrupt's account with appellant exceeded a normal limit, appellant's agents requested the chattel mortgage. [Tr. 88-90.] Contrary to the contention of the Trustee in Bankruptcy, appellant's Mr. Cross and Mr. Elliott believed the bankrupt to be solvent and possessing a net worth of about \$15,000. Furthermore, at the same time they informed their head office in Omaha that although they had extended too high a credit, they felt that "the risk was good—that is payment was prompt until the time of Mr. Bone's death. We figured the account was good." [Tr. 90.]

(3) This point raised by appellee, calling attention to the testimony by the bankrupt that in the early part of May, 1953, appellant's credit manager called in the bankrupt and cut down the credit terms, chronologically should come before the preceding item. The attention of the Court is called to the fact that this testimony, given by the bankrupt himself—obviously a biased witness—was directly contradicted by the testimony of Mr. Elmo Cross, credit manager of the appellant. Despite the fact, as testified by the bankrupt, that "things didn't look so good," he relates that they continued to give him credit for at least another month, when they stopped all credit and put him on a cash basis. Mr. Cross, on the other hand, testified that the bankrupt had always been on a two-week credit basis (not 30 days as claimed by bankrupt) and that this continued until the early part of June, 1953, when they put him on a cash basis until "he got back on his feet." At the time the appellant was checking with Dun & Bradstreet, with other suppliers

in the business and with the bankrupt's bank as to his status.

(4) Respondent trustee in bankruptcy also argues that as early as November, 1952, the bankrupt was insolvent to the tune of some \$1,700, as testified to by an accountant. Yet throughout the testimony appears the fact, testified to on both sides, that up to the time of the death of the bankrupt's partner on March 29, 1953, the firm was prompt in its payments and had a good credit standing in the industry.

Mr. Raymond Creal, accountant for the bankrupt firm, testified that when he made up a statement as of the 29th of March, the date the partner died, he found that the liabilities exceeded the assets by more than \$15,000. This same accountant, who continued on after the partner's death, presumably permitted the bankrupt to disseminate false information about his financial condition, because on April 10, 1953, Delatorre issued a signed statement to Dun & Bradstreet showing a net worth of \$16,640.00. [Tr. 83.] It must be assumed that the statement was based upon the same audit which the witness Creel made for the bankrupt after Bone's death on March 29th. On July 3rd of the same year, the bankrupt reported to Dun & Bradstreet that he was doing a volume of \$250,000 a year and that he had a net worth of some \$16,000. [Tr. 84.]

Appellant's credit manager testified that upon the partner's death they discussed the situation with the bankrupt, and were informed by him that he was in a temporary bind for cash, that he would now be better off even though he was making as much as \$1,000 per week and it would be a matter of 45 days until he had the entire

account cleaned up. [Tr. 73.] Furthermore, the bankrupt stated to Dun & Bradstreet, that he was purchasing the interest of the deceased partner for the sum of \$4,000. Query, if the business was insolvent, why was it necessary to pay \$4,000 to the widow of the deceased for her interest in a liability, and why was it permitted to give a statement to Dun & Bradstreet showing a net worth of \$16,000 when the insolvency amounted to approximately that much?

(5) Finally, appellee points out that at the time of asking for the chattel mortgage, Mr. Cross and Mr. Elliott of the appellant company had available the books of the bankrupt, and could have seen the bankrupt's insolvent condition.

As previously pointed out in this brief, there were made available to these men only the accounts receivable and accounts payable, at which they glanced and from which they reached the conclusion that the bankrupt was solvent and had a net worth of approximately \$15,000—which, singularly enough, was substantially the same report that the bankrupt gave to Dun & Bradstreet as of the same period. If the bankrupt actually was insolvent, it is only reasonable to assume that he made available to these men only such of his records as would reflect the condition which he wanted them to find, and which he wanted the trade in general to find. Great stress is placed by the appellee on the fact that Mr. Elliott, assistant credit manager of Swanson, was an accountant, yet it appears nowhere in the record that he made an audit of the bankrupt's books. On the contrary, the record shows that he was not employed as an accountant by the company—only as a credit manager.

Incidentally, appellee in his brief asks why Mr. Elliott was not produced at the time of trial, and must have overlooked the testimony which indicated that Mr. Elliott had been ill for a year and was confined in a sanitarium. [Tr. 88.]

Conclusion.

Appellant has already cited cases in its opening brief on the question of which circumstances constitute reasonable cause for a creditor to believe that his debtor is insolvent, and we believe that these authorities preclude a finding in this case that the appellant had reasonable cause to believe that the bankrupt was insolvent at the time the payments were received. Not only must the trustee show that the payments constituted a preference, but it must be shown that the creditor knew that a preference would result, *Chicago Car Equipment Co. v. Buell*, 211 Fed. 638. The record here indicates that appellant knew that the bankrupt was making payments to other creditors, that he was doing business as usual, and that there was no reason to believe him insolvent. We again cite *McDougal v. Central Union etc.*, 110 F. 2d 939, where the court said, "Although the bankrupt may act in bad faith and with a fraudulent purpose in mind, yet if the transferee is free of fraud and acts in good faith, and gives a present fair consideration in exchange for the transfer of property, the transaction cannot be set aside. Payment of an antecedent debt is a fair consideration." Not only was there an antecedent debt, but the appellant continued to deliver merchandise to the bankrupt until after at least a part of the alleged preferences were made. Some of the checks were given to replace other dishonored

checks which the bankrupt had given to the appellant in payment of “cash” deliveries of merchandise.

Appellant respectfully urges that the evidence before the trial court does not support a finding (1) that the alleged payments constituted preferences, there being only the vague and uncertain testimony of the bankrupt, some two years later, that not all of the creditors in the same class received the same proportionate share as the appellant (certainly not proper evidence), and (2) that the appellant knew, or had reasonable cause to believe, that a preference would result by its receipt of such payments.

Respectfully submitted,

NORMAN A. OBRAND,

Attorney for Appellant.

No. 14853

United States
Court of Appeals
for the Ninth Circuit

WILLIAM V. BOGGESE, as Protestant on behalf
of the City of Fairbanks, Alaska, and THE
CITY OF FAIRBANKS, ALASKA,

Appellants,

vs.

BERRY CORPORATION, STEVE BOINICH
and UNITED STATES OF AMERICA,

Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division.

FILED

OCT 27 1955



No. 14853

**United States
Court of Appeals
for the Ninth Circuit**

**WILLIAM V. BOGGESS, as Protestant on behalf
of the City of Fairbanks, Alaska, and THE
CITY OF FAIRBANKS, ALASKA,**

Appellants,

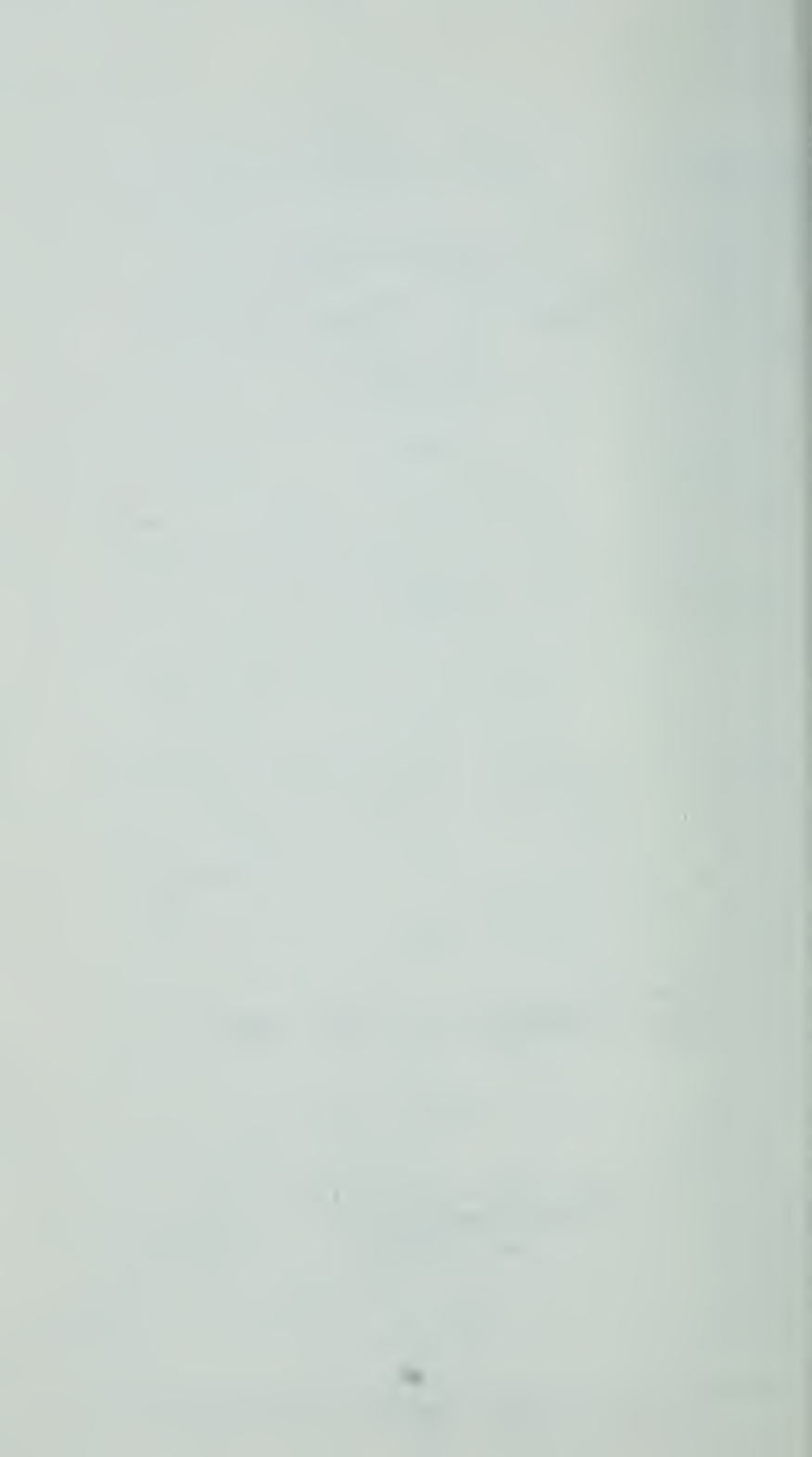
vs.

**BERRY CORPORATION, STEVE BOINICH
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Appellees.

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**Appeal from the District Court
for the District of Alaska,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Box 111,
Fairbanks, Alaska,

Attorneys for Appellee,
Internal Revenue Service.



APPLICATION FOR LIQUOR LICENSE IN THE TERRITORY OF ALASKA

3

LICENSE NO.

APPLICATION NO.

Designated hereby applies for a license to ~~Transfer~~ **Transfer Bev. Disp. Liq. Lic #5581 from BERRY CORPORATION to STEVE BOINICH** for the year ending **12/31/02**

On **31, 1905**, and tenders herewith the sum of \$..... plus a Filing fee of \$**2.00**.

and address and how long a resident of Territory of Alaska?

Name **Steve Boinich** Address **542 4th** How long a resident **25 years**

a first application for license, or is it a renewal of license? **first application**

TYPE OF LICENSE APPLIED FOR

BEVERAGE DISPENSARY		BOTTLING WORKS	\$ 100.00
operation less than 1500)	\$ 500.00	BREWERY LICENSE	100.00
operation over 1500)	1,000.00	RETAIL LICENSE	300.00
Minimum residence 1 year)		(Minimum residence 1 year)	
RESTAURANT	150.00	DISTILLERY	100.00
HOUSE	75.00	IMPORTERS	600.00
(Situations not less than 18 miles from incorporated city)		BOAT LICENSE	250.00
	200.00	(For boats over 250 tons U. S. Customs House measurement only)	

Incorporated at least 2 years) **548 2nd Ave., Fairbanks, Alaska**

Give street and number.

by any public thoroughfare, street or alley, from any school or church? **50 feet**

a 200 feet, and not a renewal, show exact location on attached plat.

any other kind of liquor license, if so, what and where? **no**

ments as to character and integrity of applicant, and desirability of issuing license applied for. (FIVE ENDORSERS MUST PERSONALLY BELOW)

Name	Address	Occupation	Residence in Territory
Herbert	542 4th	Merchant	25 years
John A. Smith	Box 36 Fairbanks	Inspector	50 years
William A. Smith	839 Third Ave	Laborer	5 years
John A. Smith	1228 8th Ave	Engineer	10 years
John A. Smith	1228 8th Ave	Engineer	10 years

a citizen of the United States? If so, born or naturalized? **Naturalized**

operation, are you qualified to do business in the Territory?

E OUTSIDE OF INCORPORATED TOWNS:

Attached hereto a petition containing the names of a majority of all citizens over the age of 21 years residing within 2 miles of the place where liquor is sold, bartered, manufactured, etc., and a complete census of that locality.

ANT DECLARES: If application is for Retail or Dispensary license, if an individual or association, that he has resided in or at least one year prior to the date of this application;

operation, that it is qualified to do business in Alaska;

operation is for a Beverage Dispensary or Retail Liquor license, that no corporation, wholesaler, owner, officer or representative, who, bottling works or distillery owns any interest in such business or has financed directly or indirectly the operation of such business, or supplying equipment or furnishings in order to conduct such business;

operation is for a distillery other than the applicant has any direct or indirect financial interest in the business for which this license is applied for, that he or she will superintend in person, the management of the business and if any other person is employed to manage the business, that he or she will have the qualifications of an applicant and that applicant will be responsible for the proper conduct of the business;

operation is for a building, hereinafter described or referred to in which liquor is to be sold is 200 feet or more from any school building or church, or a building in which the sale of intoxicating liquor was authorized by law on March 10, 1902;

operation is for a license that it is for a building in which the sale of intoxicating liquor was authorized by law on March 10, 1902;

operation is for a license that the premises are not connected by doors or otherwise with premises upon which any other business is conducted;

operation is for a Club license, that applicant has been incorporated under Territorial or National charter for two years or more.

MY CONSENT TO THIS TRANSFER: **Signed** **Steve Boinich**

CORPORATION, Name of person or corporation

Signature of officer of corporation and Title

Location of Corporation

Signature of officer of corporation and Title

Signature of officer of corporation and Title

Signature of officer of corporation and Title

Signature of officer of corporation and Title

Signature of officer of corporation and Title

Signature of officer of corporation and Title

Signature of officer of corporation and Title

Signature of officer of corporation and Title

Signature of officer of corporation and Title



[Title of District Court and Cause.]

ORDER

Upon consideration of the facts set forth and the statements made by the applicant in the foregoing application, and all or any facts adduced in relation thereto, the Court finds that the applicant is entitled to the license applied for, and It Is Hereby Ordered that the same be issued.

Dated at Fairbanks, Alaska, this 18th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

No protest.

U. S. MARSHAL.

U. S. Treasury Department
Office of the Director of Internal Revenue

March 31, 1955,
Fairbanks, Alaska.

To Whom It May Concern:

Re: Transfer of Beverage Dispensary Liquor
License #5581 from 418 2nd Ave, Berry
Corp, Inc.
to: Steve Boinich at 548 2nd Ave
Fairbanks, Alaska

Seizure of all property or rights to property belonging to the above-named Corporation was made by this office on February 23, 1955. Authority for

this seizure is covered under Section 6331 of the Internal Revenue Code of 1954. Under this Authority the United States claims all rights of the Berry Corporation (whether real or personal, tangible or intangible) in the above-noted Territorial Liquor License #5581 issued to the Berry Corporation on December 31, 1954.

On March 30, 1955, all right, title and interest of the Berry Corporation in and to the Territorial Liquor License #5581 was sold at public auction by the undersigned Collection Officer, for the United States, to Steve Boinich of Fairbanks, Alaska.

The sale was conducted in accordance with the provisions of Subchapter D, Chapter 64 of the Internal Revenue Code of 1954 and the regulations promulgated thereunder.

In accordance with the above authority, the United States does hereby consent to the transfer of Territorial Liquor License No. 5581 to Steve Boinich at 548 2nd Ave., Fairbanks, Alaska.

Very truly yours,

WILLIAM E. FRANK,

District Director of Internal
Revenue;

By /s/ MAX B. PIERCE,

Collection Officer,

Box 1009

Fairbanks, Alaska.

[Endorsed]: Filed April 4, 1955. [2*]

[Title of District Court and Cause.]

MOTION FOR TRANSFER OF LIQUOR
LICENSE

Comes Now Steve Boinich, by and through his attorney, Eugene V. Miller, of the office of Taylor, Miller & Taylor, and moves this Honorable Court to transfer Beverage Dispensary Liquor License No. 5581 from the Berry Corporation to Steve Boinich, as per the sale conducted by the United States Marshal upon the execution of the United States Bureau of Internal Revenue and sold to the said Steve Boinich.

This Motion is made pursuant to the provisions of Section 35-4-13, ACLA, as amended in the 1953 Session Laws, Chapter 131, and pursuant to Sec. 35-4-19, ACLA 1949.

Dated at Fairbanks, Alaska, this 2nd day of April, 1955.

TAYLOR, MILLER & TAYLOR,

By /s/ EUGENE V. MILLER,
Of Counsel.

Service of Copy Acknowledged.

[Endorsed]: Filed April 4, 1955. [3]

[Title of District Court and Cause.]

NOTICE OF HEARING

To: Einar Tonseth, City Clerk
City of Fairbanks
City Hall
Fairbanks, Alaska

You Are Hereby Notified that the undersigned will bring up for hearing before the United States District Court in Fairbanks, Alaska on the 7th day of April, 1955 at the hour of 1:30 p.m. in the afternoon, or as soon thereafter as counsel may be heard in the courtroom usually occupied by this Court in the United States Courthouse in Fairbanks, Alaska petitioner's Motion for Transfer of Liquor License No. 5581 from the Berry Corporation to Steve Boinich.

Dated at Fairbanks, Alaska this 2nd day of April, 1955.

TAYLOR, MILLER AND
TAYLOR,

Attorneys for Petitioner,

By /s/ EUGENE V. MILLER,
Of Counsel.

Service of Copy acknowledged.

[Endorsed]: Filed April 4, 1955. [4]

[Title of District Court and Cause.]

PROTEST

Comes Now William V. Boggess, City Attorney for the City of Fairbanks, Alaska, and protests against the transfer of liquor license sought by movant in the above-entitled cause and alleges and avers in support thereof as follows:

I.

That on March 31st, the movant, Steven Boinich, filed with the Clerk of this Court an application for transfer of the subject license, Beverage Liquor License #5581, which said application is of record herein.

II.

That said application was made on a form generally used for new licenses and contained the names of five persons as references to the integrity of the applicant, movant herein, in apparent compliance with Section 35-4-13, ACLA 1949, as amended by Chapter 131, S.L.A. 1953.

III.

That said application was subsequently referred to the City Council of the City of Fairbanks, Alaska, by the Clerk of this Court in apparent compliance with said Section 35-4-13 as amended, and the said City Council has not yet approved or disapproved of same.

IV.

That in said application, the applicant, movant herein, stated in effect that his business under said license, if transferred, was to be conducted at 548

Second Avenue which is a different location than that licensed under the license herein sought to be transferred, as evidenced by Item 5 of said application:

“5. Location of business to be conducted (Give Street and No.) 548 2nd Avenue.”

V.

That the license herein sought to be transferred was issued by the Clerk of this Court for a business to be conducted at 418 2nd Avenue in the City of Fairbanks, Alaska, and not for 548 2nd Avenue, as may be ascertained from the application therefor of the Berry Corporation, proposed transferor, which was filed with the Clerk of this Court on December 3rd, 1954.

VI.

That, as indicated by the aforesaid application of the movant, Steve Boinich, and by the proceedings had before this Court in Cause No. 8355 involving a protest by the United States of America against an attempted transfer of the same license, it is the intent and purpose of the movant to operate a beverage dispensary business at 548 2nd Avenue and not at the licensed premises, 418 2nd Avenue.

VII.

That the files and proceedings above-referred to are incorporated in this Protest to the same intent and purpose as if the same were fully set out herein.

VIII.

That on the 2nd day of April, 1955, the protested motion was filed herein and notice of hearing

thereon was served upon the City Clerk for the City of Fairbanks although no statutory authority or necessity therefor existed. That the inference to be drawn therefrom is that movant contends there is no necessity to procure the approval of the City Council in these proceedings.

IX.

That Section 35-4-14 ACLA 1949, referring to a class of licenses inclusive of the subject license, provides in part as follows: [6]

“All applicants for licenses mentioned herein shall file with the Clerk of the District Court
* * *.

“(1) * * *

“(2) A description of the place for which the license is desired, giving address by street and number, or other information, so that the location can be definitely determined;”

That Section 35-4-13 ACLA 1949, as amended by Chapter 131, S.L.A. 1953, with reference to liquor licenses to be issued outside of incorporated towns, requires the consent of “two-thirds of the citizens over the age of twenty-one years, residing within one mile of the place where intoxicating liquor is to be manufactured, bartered, sold or exchanged
* * *.”

That Section 35-4-13, ACLA 1949, with reference to liquor licenses within incorporated towns, requires that the application therefor “have attached * * * at least five references as to the integrity of the

applicant and the desirability of issuing of a license for the premises mentioned therein” and requires the submission of such application to the City Council of such town for approval or disapproval.

That Section 35-4-15 ACLA 1949, Part (1), provides in part as follows:

“* * * and it shall be unlawful for any licensee to permit the giving, selling, bartering, or drinking of any intoxicating liquor within the premises covered by any license to or by any of the forbidden classes, nor shall such licensee permit the drinking of hard or distilled liquors by any person upon the premises covered by his license, unless the same is permitted under the classification of his license.”

That Section 35-4-15, Part 4, ACLA 1949, provides in full as follows:

“(4) Premises to be accessible for inspection. The premises of licensees under this Act shall be easily accessible for inspection by municipal officers, United States Attorneys, Assistant United States Attorneys, United States Marshals, Deputy Marshals and Clerks of the District Court, and all other [7] officers charged with the enforcement of the provisions of this Act, during all regular hours of the transaction of business upon said premises. For the purpose of this Act, the premises covered by any license issued hereunder, shall be held to include all rooms in any building which can be reached without leaving the building.”

X.

That it is manifest from the foregoing statutes that the subject license and any other Territorial Liquor License is confined to and permits the operation of a liquor business only on the premises designated in the application for such license. That a transfer of said license cannot confer upon the transferee any right to conduct such business upon different or other premises. That to establish a new business upon different premises would require an application for a new license subject to all of the precedures established therefor. That to hold otherwise would nullify the Territorial intent that the City Council within incorporated towns pass on the location of liquor businesses therein and that the affected residents without incorporated towns pass on the location of such businesses.

Wherefore, protestant prays that this Court deny the Motion for Transfer on file herein or, in the alternative, if granted, that the movant be ordered to conduct said business upon no other premises than those licensed, to wit: 418 2nd Avenue in the City of Fairbanks, Alaska.

/s/ WILLIAM V. BOGGESE,

Attorney for City of Fair-
banks, Alaska, Protestant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 7, 1955.

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 8375

IN THE MATTER OF THE TRANSFER OF
BEVERAGE DISPENSARY LIQUOR LI-
CENSE No. 5581, FROM BERRY COR-
PORATION TO STEVE BOINICH

OPINION

This hearing came on before the Court on the motion of Steve Boinich for transfer of beverage dispensary license No. 5581. This license, previously issued to the Berry Corporation, was purchased by Steve Boinich from the United States after it had been seized through levy by the Internal Revenue Service. The motion was made pursuant to Sections 35-4-13, as amended, and 35-4-19, of the Alaska Compiled Laws Annotated, 1949. Section 35-4-13, as amended by Chapter 131, Session Laws of Alaska, 1953, provides in part that "No license issued under the provisions of this Act shall be transferred except after first securing the consent of the Court. No refund of license fees will be allowed after the issuance of license," and Section 35-4-19 provides in part that "no license shall be transferred by the licensee to any other person except with the written consent of the Court, but authority for the same shall issue upon application thereto in writing."

Notice of the motion was served upon the attorneys for Hubert F. Cox and upon the City of

Fairbanks. The motion was protested by the Polaris Investment Co., Inc., Hubert F. Cox, the Berry Corporation and the City of Fairbanks. The United States Attorney appeared in the action on behalf of the Internal Revenue Service and contended that under Section 35-4-19 the [10] Court was obliged to grant the application for transfer.

It seems to be admitted by the parties and the Court finds that, "Nothing in the law indicates that the Court is bound by the action of a city council, although the decision of the council is entitled to great respect and consideration. That the Court must exercise lawful and sound, and not arbitrary discretion in granting or reviewing licenses is beyond question. Apparently it is within the power of the Court to deny an application which has been approved by the council, and likewise within its power to approve an application which has been rejected by the council." In *Re Alaska Labor Trades Association*, 10 Alaska Reports Page 485.

There is no provision in the Alaska Code which requires that a motion for transfer of a liquor license be referred to the city council, nor is there a provision in the law which requires that a transfer of a liquor license be reviewed by the city council; nevertheless, the Court in this instance required notice of the motion to be served on the city thus giving the city an opportunity to voice its approval or disapproval of the contemplated transfer. The city council did not choose to either approve or disapprove the transfer. No one has questioned the

character of Mr. Boinich, the party seeking the transfer of the license, and no one has questioned the desirability or fitness of the premises to be licensed; instead, the City has filed a protest which the Court construes to be confined to the proposition that the owner of a liquor license is restricted by law to the sale of intoxicating liquors on the premises covered by such license. While that question is not before the Court in this hearing, the Court, nevertheless, approves the reasoning advanced by the city and believes that a license to sell intoxicating liquors in one location does not [11] permit the licensee to conduct such business in another location. But, the question now before the Court is whether such a license may be transferred from one location to another, and the Court holds that such a transfer can be accomplished under existing laws. The Court can find no reason to hold otherwise.

The statutes hereinbefore cited specifically provide that licenses may be transferred by the licensee with the written consent of the Court and it seems ridiculous to hold that the legislature intended to confine such transfer to transfers from person to person and to preclude transfers from place to place. Argument has been advanced that to permit a license to be transferred from place to place could and would work great injustices by fraudulently obtaining a license for a suitable or desirable place and then having the license transferred to some unsuitable or undesirable place. That argument fades away in the light of reason because the statutes

specifically provide that no transfer may be effected without the written consent of the Court, if sound the same argument would also apply to transfers from person to person. In the instant case, had a successful showing been made that the place to which the transfer is requested is an undesirable place, the Court could and would have denied the transfer. It has been well reasoned by the superior Courts of various jurisdictions that liquor licenses are properties of value to the licensee, his administrators, executors and assigns in jurisdictions where the licensee is given the right to assign subject to the approval of the Court or other issuing authority. If it is to be held that a license once issued must under all circumstances remain in the place originally licensed, much havoc would be wrought; the landlord or lessor of the licensed premises would, by the mere issuance of a license to his lessee, [12] own a greater property in the license than the licensee. The aforesaid statutes provide, *inter alia*, that no license fee shall be refunded; therefore, under the position taken by the city, a license duly issued for one location on January first would have utterly no value to the licensee if the licensed premises were destroyed by fire, or otherwise, on January second, even though the licensee had invested thousands of dollars in equipment to be moved into the licensed premises. It seems obvious to the Court that the legislature by the plain wording of the statutes did not intend such a result.

The protests filed by Polaris Investment Co., Inc., Hubert F. Cox and the Berry Corporation seek to

attack the validity of the sale of the license by the United States to Steve Boinich. The validity of such sale is not properly before the Court. The interests of Polaris Investment Co., Inc., Hubert F. Cox, R. P. Hill and Mary Hill in liquor license No. 5581 were perhaps before the Court in civil case No. 8355 wherein, on an agreed state of facts, the Court on March 29, 1955, decided that their claims to the license in question were not valid and their protests were denied.

The Court finds that under the applicable provisions of the Alaska Code pertaining to beverage dispensary licenses, only the approval of the Court is required for transfer of a license. Mr. Boinich having shown to this Court, without opposition, that he is a proper person to whom said license may be transferred, and having further shown, without opposition, that the location to which the transfer is desired is a suitable location, the transfer of the license to Mr. Boinich and to the location specified in his application is approved.

The motion for transfer having been granted, the Clerk [13] of this Court shall issue an appropriate certificate setting forth that beverage dispensary license No. 5581 is hereby transferred to Steve Boinich.

Dated at Fairbanks, Alaska, this 16th day of April, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed April 18, 1955. [14]

[Title of District Court and Cause.]

OPINION AND ORDER

The Court having taken the matter of the transfer of Beverage Dispensary License No. 5581 from the Berry Corporation to Steve Boinich on his application under advisement and now being fully advised in the premises, it was Ordered that the application of Steve Boinich for the afore-mentioned transfer be granted and that the clerk of this court issue said transfer to the applicant forthwith.

Entered April 18, 1955. [15]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Now Comes William V. Boggess, as Protestant on behalf of the City of Fairbanks, Alaska in the above-entitled cause and hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and decision of the above-entitled Court entered April 18th, 1955, transferring the above-described Territorial Liquor License from the Berry Corporation to Steve Boinich and to a different location than for which it was originally issued.

Dated at Fairbanks, Alaska, this 18th day of May, 1955.

/s/ WILLIAM V. BOGGESS,
Protestant on Behalf of the
City of Fairbanks, Alaska.

Receipt of copy acknowledged.

[Endorsed]: Filed May 18, 1955. [16]

[Title of District Court and Cause.]

APPEAL BOND

William V. Boggess, Protestant, Appellant herein, as Principal, and Paul R. Hagelbarger and Lois Tait, as sureties, appearing and submitting to the jurisdiction of the Court, hereby undertake for themselves, and each of them, their, and each of their, heirs, executors, administrators, successors and assigns, to make good all taxable costs and charges, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), that the Appellees may be put to, or allowed, if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified.

The said sureties hereby irrevocably appoint the Clerk of the above-entitled Court as their agent upon whom any papers affecting their liability on this undertaking may be served.

Signed, sealed and delivered this 18th day of May, 1955.

/s/ WILLIAM V. BOGGESS,
Principal, Appellant.

/s/ PAUL R. HAGELBARGER,

/s/ LOIS TAIT,
Sureties.

United States of America,
Territory of Alaska—ss.

Paul R. Hagelbarger and Lois Tait, each being duly sworn, say: That I am a surety on the foregoing Appeal Bond; that I am a resident within the District of Alaska; that I am not a counselor or attorney at law, deputy marshal, commissioner, clerk of any court, or other officer of any court, and that I am worth the sum of \$250.00 over and above all debts and liabilities and property exempt from execution.

/s/ PAUL R. HAGELBARGER,

/s/ LOIS TAIT.

Subscribed and sworn to before me this 18th day of May, 1955.

[Seal] /s/ CLAUDIA STUDEBAKER,
Notary Public for Alaska.

My commission expires 3/11/59.

[Endorsed]: Filed May 18, 1955. [17]

[Title of District Court and Cause.]

ORDER

Pursuant to Rule 73 of the Federal Rules of Civil Procedure, it is hereby ordered that the time for the filing of the record on appeal and the docketing of the appeal in the United States Court of Appeals for the Ninth Circuit be extended until the 10th day of August, 1955.

Done and Ordered Entered this 24th day of June, 1955.

/s/ VERNON D. FORBES,
District Judge.

[Endorsed]: Filed and entered June 24, 1955.

[Title of District Court and Cause.]

AFFIDAVIT OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the proceedings listed below comprise all proceedings listed on the Designations of Record of the respective parties herein, viz.:

- 1—Application for liquor license transfer with letter from Internal Revenue Service attached.
- 2—Motion for Transfer of liquor license.
- 3—Notice of Hearing.
- 4—Protest of City of Fairbanks against transfer.
- 5—Opinion of the Court re transfer.
- 6—Opinion and Order re the transfer.

7—Notice of Appeal.

8—Appeal Bond.

9—Order extending time to docket appeal.

10—Statement of Points.

11—Designation of Record of Appellant, City of Fairbanks.

12—Affidavit of Service of No. 10 and 11 above.

Witness my hand and the seal of the above-entitled Court this 8th day of August, 1955.

[Seal] /s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14,853. United States Court of Appeals for the Ninth Circuit. William V. Boggess, as Protestant on behalf of the City of Fairbanks, Alaska, and the City of Fairbanks, Alaska, Appellants, vs. Berry Corporation, Steve Boinich and United States of America, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed August 10, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14,853

In the Matter of

The Transfer of Beverage Dispensary Liquor License No. 5581, from BERRY CORPORATION to STEVE BOINICH;

CITY OF FAIRBANKS, ALASKA,

Appellant.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Pursuant to Rule 17 of the rules of the above-entitled Court, the Appellant City of Fairbanks, Alaska, hereby states that the points upon which it intends to rely upon this appeal are that the District Court for the District of Alaska, Fourth Division, erred in holding that a liquor license issued pursuant to the laws of the Territory of Alaska could be transferred from location to location and in ordering the liquor license, subject to the proceedings in the said District Court, to be so transferred.

That the entire record as certified to this Court is material to the consideration of this appeal.

Dated at Fairbanks, Alaska, this 12th day of August, 1955.

/s/ WILLIAM V. BOGGESS,
Attorney for City of Fairbanks, Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 17, 1955.

No. 14,853

United States Court of Appeals
For the Ninth Circuit

WILLIAM V. BOGGESE, as Protestant on
behalf of the City of Fairbanks,
Alaska, and THE CITY OF FAIRBANKS,
ALASKA,

Appellants,

VS.

BERRY CORPORATION, STEVE BOINICH
and UNITED STATES OF AMERICA,

Appellees.

Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF FOR APPELLANTS.

WILLIAM V. BOGGESE,
213 Nerland Building, Fairbanks, Alaska,
Attorney for Appellants.

FILED

NOV - 3 1955

PAUL P. O'BRIEN, CLERK



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Statutes

Alaska Compiled Laws Annotated, 1949:

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United States Court of Appeals For the Ninth Circuit

WILLIAM V. BOGGESS, as Protestant on
behalf of the City of Fairbanks,
Alaska, and THE CITY OF FAIRBANKS,
ALASKA,

Appellants,

VS.

BERRY CORPORATION, STEVE BOINICH
and UNITED STATES OF AMERICA,

Appellees.

Appeal from the District Court for the
District of Alaska, Fourth Division.

BRIEF FOR APPELLANTS.

STATEMENT OF JURISDICTION.

This is an appeal from an order of the District Court for the District of Alaska, Fourth Division, entered April 18th, 1955, ordering the transfer of Beverage Dispensary License No. 5581 from the appellee Berry Corporation to the appellee Steve Boinich. The order appealed from was a final decision by the Court below that it had statutory authority to

transfer a liquor license from one location to another within the City of Fairbanks, Alaska.

As such a final decision, said order may be appealed to this Court under the provisions of Title 28, USCA, Section 1291.

STATEMENT OF CASE.

On March 30, 1955, the appellee Steve Boinich, at a public auction held by the appellee United States of America, purchased Beverage Dispensary License No. 5581. (Tr. 5, 6.) This license had been issued pursuant to the laws of the Territory of Alaska to the appellee Berry Corporation and authorized said Corporation to sell alcoholic beverages "for consumption on the premises only" at 418 Second Avenue in the City of Fairbanks, Alaska. (ACLA 1949, Sec. 35-4-21 (A).) Seizure of said license from the Berry Corporation by the United States for tax delinquencies had been accomplished on February 23, 1955. (Tr. 5, 6.)

On April 4th, 1955, the appellee Steve Boinich filed a paper denominated "Application For Liquor License in the Territory of Alaska" in the Court below. (Tr. 3.) Although so entitled, this application sought a transfer of said Beverage Dispensary License No. 5581 from the Berry Corporation to the appellee Boinich and for a change of the location of said business from 418 Second Avenue in the City of Fairbanks, Alaska, to 548 Second Avenue in said City. In lieu of a consent to the proposed transfer by

the Berry Corporation, a letter of consent by the United States of America relating the facts of said seizure and sale was attached to said application. (Tr. 5, 6.)

Also on April 4th, appellee Boinich filed a "Motion For Transfer of Liquor License" (Tr. 7) and a "Notice of Hearing" thereon. (Tr. 8.) This notice was addressed to the City Clerk of the City of Fairbanks, Alaska, and served on said Clerk apparently by direction of the Court below. (See Opinion of Court below, second paragraph, Tr. 15.)

The City of Fairbanks responded to said notice through its attorney by filing a Protest against the proposed transfer on April 7th, 1955. (Tr. 9-13.) This protest directly raised the question of whether or not the Court below possessed the authority to transfer a Beverage Dispensary License from one location to another.

By written opinion filed April 16th, 1955, the Court below affirmatively held that it had such authority (Tr. 16) and on April 18, 1955, ordered such transfer granted. (Tr. 19.)

From this order an appeal was taken to this Court on behalf of the appellant City of Fairbanks, Alaska.

SPECIFICATION OF ERROR RELIED UPON.

That the Court below erred in holding that a Beverage Dispensary License issued pursuant to the laws of the Territory of Alaska could be transferred from

one location to another and in ordering the license subject to these proceedings to be so transferred.

ARGUMENT OF CASE.

All relevant provisions of the statutes of the Territory of Alaska applicable to licenses of the class herein considered are set out in full in the Appendix to this Brief.

From a perusal of those statutes, it is clear that a beverage dispensary license confers a privilege on the holder thereof to conduct the authorized business only upon the licensed premises.

ACLA 1949, Section 35-4-14, as amended by Chapter 131, SLA 1953, requires an applicant for license to furnish "a description of the place for which the license is desired; giving address by street and number, or other information, so that location can be definitely determined." ACLA 1949, Section 35-4-21 (A) reads in part as follows:

"A Beverage Dispensary License shall give to the holder thereof the right to sell or serve on the premises beer, wine and hard liquor for consumption on the premises only. Provided, however, that the premises for which such license is issued shall not be connected by doors or otherwise with premises covered by any other license issued under these regulations; * * *"

Other language clearly indicative of legislative intent to confine a license to the premises for which it is issued is italicized in the Appendix.

Concerning the issuance of a license, the Territorial Legislature established elaborate safeguards to protect the interests of the people in the location of the premises to be licensed. First, as has been indicated, the applicant must file an application in the District Court for the District of Alaska, which must specify the location of his business with certainty. (ACLA 1949, Section 35-4-14, as amended by Chapter 131, SLA 1953.) If the application is for a place of business within the boundaries of an incorporated town, as in the instant case, it must be referred by the Clerk of the Court to the "City Council of that town" for its approval or disapproval. (ACLA 1949, Section 35-4-13, as amended by Chapter 131, SLA 1953.) If the application is for a place of business without the corporate limits of a town, then it must be accompanied by the "consent of two-thirds of citizens over the age of twenty-one years, residing within one mile of the place where the intoxicating liquor or liquors are to be manufactured, bartered, sold and exchanged, or bartered, sold and exchanged * * *." (ACLA 1949, Section 35-4-14, sub-part (5), as amended by Chapter 131, SLA 1953.)

All such licenses, both within and without incorporated towns are issued by the Clerk of the Court in compliance with the order of the Court. (ACLA 1949, Section 35-4-12.) It is the function of the Court at the time set for hearing upon any such application to consider the same "and any protests that may be filed against the same, and * * * (to) * * * also hear the applicant or others appearing in connection with

the matter, and give its judgment, which shall be final. * * *” (ACLA 1949, Section 35-4-13, as amended by Chapter 131, SLA 1953.)

The function of a city council in reference to such applications was discussed by the late Judge Dimond in *In re Alaska Labor Trades Ass’n.*, 10 Alaska 477, at pages 485, 486, as follows:

“It is notable that with respect to applications for places outside of incorporated cities no showing is required, in the application or otherwise, ‘as to the integrity of the applicant and the desirability of the issuing of a license for the premises mentioned.’ Apparently all that is necessary is such an application in compliance with law and the consent of a majority of the local residents. As to an application for use in an incorporated city, however, the prescribed procedure is, as above stated, by reference first to the city council. Nothing in the law indicates that the court is bound by the action of a city council, although the decision of the council is entitled to great respect and consideration. That the court must exercise lawful and sound, and not arbitrary, discretion in granting or refusing licenses is beyond question. Apparently it is within the power of the court to deny an application which has been approved by the council, and likewise within its power to approve an application which has been rejected by the council. It may well be that all matters relating to the integrity of the applicant and the desirability of issuing the license are addressed to the discretion of the city council and not to that of the court. In that view, the court may not justly refuse to grant an application showing compliance with the law

if the city council has approved the application, nor may the court grant an application which has been disapproved by the council upon grounds of lack of integrity or desirability though the application itself shows compliance with law, except, possibly, for arbitrary or capricious action by the council amounting to abuse of discretion. At any rate it is obvious that in all cases the provisions of law must control: that no application should be denied by the court which is in conformity with law and is approved by the city council, and no application should be granted by the court where it appears that although the application has been approved by the city council the application is not in conformity with law and it is obvious that the license cannot be availed of without continuous violation of law."

It is to be noted the requirement of consent by a majority of the local residents referred to by Judge Dimond was raised to a consent by two-thirds of the local residents in 1953.

The Court below relied on the following statutes as authority for it to transfer a liquor license from one location to another: ACLA 1949, Section 35-4-13, as amended by Chapter 131, SLA 1953, which provides in part as follows:

"* * * No license issued under the provisions of this Act shall be transferred except after first securing the consent of the court * * *."

and ACLA 1949, Section 35-4-19, which provides in full as follows:

"No license shall be issued for a greater period than one year; and no licenses shall be trans-

ferred by the licensee to any other person except with the written consent of the Court, but authority for the same shall issue upon application thereto in writing."

The language as quoted does not expressly or by necessary implication authorize the Court to transfer a liquor license from one location to another. Certainly it does not expressly authorize such transfer. Since, concededly, the license is to "dispense liquor" at a particular location and the statute refers to a transfer "by the licensee to any other person" the necessary implication is, in fact, that licenses be transferred from person to person only.

It is difficult for appellants to perceive how the Court had authority, statutory or otherwise, to confer on the transferee of a license any greater privilege than was possessed by the transferor.

Applications for an annual license or for a renewal thereof are required to be submitted to a council for its approval or disapproval. But under the holding of the Court below, a new location can be obtained without that approval. The distinction between an "original application" and a "motion to transfer" under such circumstances is meaningless. In either case, the interest of a city and its council is the same. Why attribute to the Legislature, then, the anomalous intent of requiring prior approval in one case and not the other?

Nor is it a sufficient answer to the problem to state that liquor licenses have value and are therefore transferable from location to location. The question

of their transferability should be first determined. Upon that determination turns the question of their value.

It is to be noted also that the Court below made no distinction between the transfer of licenses for locations without the limits of an incorporated town and those within such limits. No such distinction could be made. And yet, whereas the application for original license without a town requires the consent of two-thirds of the citizens over the age of twenty-one years residing within one mile of the proposed place of business, the Court could, according to its opinion, approve a transfer of site without the consent of two-thirds of the citizens residing within a one mile radius of the new place of business; and for ought that appears, could transfer a license from without the town to a place within it.

Undue hardship to lessees and loss of the licensed premises by fire are cited by the Court below as militating against any construction of the law which would prevent a transfer from location to location. This argument should be addressed to the Territorial Legislature. That body can provide for transfers of location and set up a procedure whereby the interests of the City are adequately protected. In this connection, the Court below was apparently disturbed by its position and required the appellee Boinich to prepare and serve notice of hearing on the appellant City on appellee's Motion for Transfer. (Opinion of Court below, Tr. 15.) The Court below realized that there was no statutory necessity for a hearing on motions for

transfer, but, having decided to enlarge on its statutory authority, it also found it necessary to fill a procedural vacuum created by such enlargement.

The case of *State v. Paige*, 123 Mont. 301, 213 P. (2d) 441, supports appellant's position that where a liquor license is confined to a particular premises, statutory authority to transfer such license does not authorize a change of its location.

CONCLUSION.

In conclusion, for the reason that the Court below had no authority to order Beverage Dispensary License No. 5581 transferred from one location to another, it is respectfully submitted that the order of said Court to that effect be set aside.

Dated, Fairbanks, Alaska,
October 25, 1955.

Respectfully submitted,
WILLIAM V. BOGGESS,
Attorney for Appellants.

(Appendix Follows.)

Appendix.



Appendix

The relevant provisions of the Statutes cited are as follows:

ACLA 1949, Section 35-4-11:

35-4-11. *Liquor manufacture and traffic controlled by Act: What included in term "intoxicating liquor."* No person, firm, corporation or company shall manufacture, sell, offer for sale or keep for sale, traffic in, barter or exchange for goods in this Territory, any intoxicating liquor except as hereinafter provided; but this shall not apply to sales made by a person under provisions of law requiring him to sell personal property. Whenever the term "intoxicating liquor" is used in this Act it shall be deemed to include whiskey, brandy, rum, gin, wine, ale, porter, beer, hooch-inoo and all spirituous, vinous, malt and other fermented or distilled liquors.

ACLA 1949, Section 35-4-12:

35-4-12. *Licenses: Issuance: Record.* The licenses provided for in this Act shall be issued by the Clerk of the District Court or any subdivision thereof in compliance with the order of the Court or Judge thereof duly made and entered; and the Clerk of the Court shall keep a full record of all applications for licenses and of all recommendations for and remonstrances against the granting of licenses and of the action of the Court thereon.

ACLA 1949, Section 35-4-13, as amended by Chapter 131, SLA 1953:

35-4-13. *Application for license: Consent of citizens: Proceedings and hearings on application: Posting license: Transfer of license: Refund of fees: Renewals.* Before any license is granted, as provided in this Act, it shall be shown to the satisfaction of the Court that two-thirds of the citizens over the age of twenty-one years, residing within one mile of the place where intoxicating liquor is to be manufactured, bartered, sold and exchanged, or bartered, sold or exchanged, have in good faith consented thereto and no license shall be granted in the absence of such evidence; provided, that when it is made to appear that two-thirds of said citizens over the age of twenty-one years of any one place outside the corporate boundaries of an incorporated town have consented to the manufacture, barter, sale and exchange or the barter, sale and exchange of intoxicating liquor, no further proof of the consent of the citizens of the place where such intoxicating liquor is to be manufactured, bartered, sold and exchanged, or bartered, sold and exchanged, will be required for a renewal upon application approved by the Court of said license from year to year so long as the licensee shall not have been found guilty of an infraction of the Territorial liquor laws; provided applicant shall file a sworn statement to the effect that applicant has not been convicted of any infraction of the Territorial Liquor Laws.

Provided, however, that any application for a license coming from within an incorporated town shall have attached thereto in lieu of two-thirds of the citizens of that district, a list of at least five references as to the integrity of the applicant *and the desirability of the issuing of a*

license for the premises mentioned therein. The Clerk of the Court, upon receipt of each application from within an incorporated town, shall notify the city council of that town of the necessity for action on the application by the council, in regular or special meeting and the filing with the Clerk of the Court of a certificate showing the action taken. A failure of the municipal officers to act upon applications for licenses within the period specified in the notice furnished them shall be considered a default and shall subject the city to the penalty of losing its right to a refund as herein provided. At the time set for the hearing, the Court shall consider the application and any protests that may be filed against the same, and shall also hear the applicant or others appearing in connection with the matter, and give its judgment, which shall be final. If the application is rejected the fee accompanying the same shall be returned. The licensee shall cause the license to be posted in a conspicuous position in his place of business, so that anyone entering the premises may easily read it. No license issued under the provisions of this Act shall be transferred except after first securing the consent of the Court. No refund of license fees will be allowed after the issuance of license.

ACLA 1949, Section 35-4-14, as amended by Chapter 131, SLA 1953:

35-4-14. *Filing, form and contents of application: False statements in application.* All applicants for licenses mentioned herein shall file with the Clerk of the District Court an application in writing, signed and sworn to by the applicant, giving his name and address, and, if a corpora-

tion, executed by the duly authorized officers thereof, containing the following:

(1) Kind of license desired;

(2) *A description of the place for which the license is desired, giving address by street and number, or other information, so that the location can be definitely determined;*

(3) A statement of the citizenship or corporate qualifications of the applicant;

(4) The necessary license fee;

(5) Together with the consent of two-thirds of citizens over the age of twenty-one years, residing within one mile of the place where the intoxicating liquor or liquors are to be manufactured, bartered, sold and exchanged, or bartered, sold and exchanged; provided, however, that as pertaining to applicants for licenses outside the corporate boundaries of an incorporated town, said consent shall not be required for a renewal of said license from year to year so long as the licensee shall not have been found guilty of an infraction of the Territorial liquor laws. That if any false material statement is made in any part of such application the applicant or applicants shall be deemed guilty of perjury and upon conviction thereof shall be subject to the penalty provided by law for the crime of perjury.

That should it appear to the District Court that any of the statements above enumerated and required in the application are untrue at the time of application for such license, such application shall be denied. That should it appear to the District Court after the granting of such license that any of the statements above enumerated and

required to be made in the application are untrue, it shall be the duty of the Court to forthwith enter an order revoking such license and all license moneys deposited by the applicant shall be thereby forfeited to the Territory, and it shall be the duty of the United States Marshals and their deputies, and United States Attorneys and their assistants, and all chiefs of police and other peace officers in their respective Divisions, Districts, Towns or settlements to investigate and report to the District Court any violation of any of the provisions of this Act.

ACLA 1949, Section 35-4-15(1), as amended by Chapter 54, SLA 1951:

35-4-15. *Restrictions on sale or disposition of liquor: Minors, intoxicated persons and drunkards: Election days: Near churches and schools: Licensee's premises and inspection thereof: Licenses: Seizure and sale of contraband liquor.*

(1) (Sale, etc., to minors, intoxicated persons or drunkards: Classification of premises.) It shall be unlawful to give, barter or sell any intoxicating liquors, including beer and wine, to any person under the age of twenty-one years, to any intoxicated person, or to any habitual drunkard; and it shall be unlawful for any licensee to permit the giving, selling, bartering or drinking of any intoxicating liquor *within the premises covered by any license* to or by any of the forbidden classes, nor shall such licensee permit the drinking of hard or distilled liquors by any person *upon the premises covered by his license*, unless the same is permitted under the classification of his license.

(Revocation of license: Persons deemed minors.) The drinking of intoxicating liquors on *the premises covered by any license* by any of the forbidden classes, or the presence of any intoxicated person on such premises, shall be cause for revocation of any such license, and further, that any person attending any grade or high school shall be considered less than twenty-one years of age, and the burden of determining the age shall be on the licensee.

(Sales on election day.) It shall be unlawful to give, barter, sell, or in any way dispose of any intoxicating liquor, including beer and wine, upon any day on which any general, special, or Primary Election is held in the Territory or to so dispose of liquor in any Municipality or other Political Subdivision thereof when an election is being held therein until the polls have been closed on such day.

ACLA 1949, Section 35-4-15 (2):

(2) (Presence of minors on premises.) It shall be unlawful to permit any person under the age of twenty-one years to enter any Beverage Dispensary unless the said minor is accompanied by his parent or guardian.

ACLA 1949, Section 35-4-15 (3), as amended by Chapter 83, SLA 1949 and Chapter 116, SLA 1953:

(3) (Proximity to School or Church.) No beverage dispensary license or package liquor store license shall be issued for the sale of any intoxicating liquor in any building within two hundred feet of any school ground or church building by shortest direct line from such school ground or

church building, within any corporate municipality, nor within one quarter of a mile of any school ground or church building where such school ground or church building is located outside the corporate limits of a municipality; provided, further, that no license as referred to in this section shall be issued for use in any building within two miles of any land grant University. Provided, however, that a license may be reissued for the sale of intoxicating liquor in any building in which such sale was authorized by law at a time subsequent to March 23, 1949.

Be it further provided, however, that when a license for the sale of intoxicating liquor in any building within 200 feet of a school ground or church building, within the corporate limits of a municipality, or within a quarter of a mile in areas outside the corporate limits of a municipality, is forfeited by reason of a violation of law, no license for the sale of intoxicating liquor on those premises shall thereafter be issued.

ACLA 1949, Section 35-4-15 (4):

(4) (Premises to be accessible for inspection.) The premises of licensees under this Act shall be easily accessible for inspection by municipal officers, United States Attorneys, Assistant United States Attorneys, United States Marshals, Deputy Marshals and Clerks of the District Court, and all other officers charged with the enforcement of the provisions of this Act, during all regular hours of the transaction of business upon said premises. *For the purpose of this Act, the premises covered by any license issued hereunder, shall be held to include all*

rooms in any building which can be reached without leaving the building.

ACLA 1949, Section 35-4-15 (5):

(5) (Stock confined to licensed premises: Sale from carrier or boat.) It shall be unlawful for the holder of any Wholesaler's, Brewer's, Distiller's, or Bottler's License to carry for sale any stock of intoxicating liquors in the Territory *except on the premises licensed*, and it shall be unlawful for any of the four above-mentioned classes to sell any such intoxicating liquors from any boat or other carrier.

ACLA 1949, Section 35-4-15 (8):

(8) (Duration of licenses.) Licenses granted upon any application made prior to July 1, 1937, for any new licenses, or for the renewal of existing licenses, shall be effective only to that date, and all licenses thereafter shall be issued for the fiscal year, ending December 31, but no license shall be issued for less than one-half year.

ACLA 1949, Section 35-4-15 (10), (11), (12), (13), (14) as added by Chapter 115, SLA 1955:

(10) Any person who influences or attempts to influence the sale, giving or serving of intoxicating liquor, including beer and wine, to a person under twenty-one years of age, by misrepresenting the age of such person, or who shall order, request, receive, or procure intoxicating liquor from any licensee, employee, or other person for the purpose of selling, giving, or serving the same to a person under twenty-one years of age, is guilty of a misdemeanor.

(11) Any person under the age of twenty-one years who shall *enter any licensed premise* where intoxicating liquor is sold, not in the company of his or her parent or legal guardian, or who shall offer or present to any licensee, employee, or other person a fraudulent or false certificate of birth or other written evidence of age, which is not actually his or her own, or who shall otherwise misrepresent his or her age, for the purpose of inducing the licensee or employee, or other person to sell, give, serve, or furnish intoxicating liquor contrary to law, is guilty of a misdemeanor.

(12) Any licensee, employee or other person who questions, or has reason to question, whether a person *entering upon a licensed premises*, or ordering, purchasing, attempting to purchase or otherwise procuring or attempting to procure the serving or delivery of intoxicating liquor, has attained the age of twenty-one years, shall require such person to sign a statement that he or she is over the age of twenty-one years. Said statement shall be made upon a form to be prepared by and furnished to the licensee, employee, or other person by the Territorial Tax Commissioner.

(13) Any licensee, employee, or other person who allows to remain *upon a licensed premises* where intoxicating liquors are sold, not in company of his or her parent or legal guardian, or sells, gives, or serves intoxicating liquor to any person under the age of twenty-one years, without having procured the signature of said person upon a statement as herein provided, or who knowingly sells, gives, or serves intoxicating

liquor to or allows said person to *remain on a licensed premises* where intoxicating liquor is sold, shall be guilty of a misdemeanor.

(14) Any person violating any provision of this Act, or any provision of the law of Alaska pertaining to intoxicating liquor, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by imprisonment of not more than one year or by a fine of not more than \$500.00. When the violation *involves a licensed premises* in addition to all other penalties that may be imposed by this Act, the following punishment may be also imposed, each violation to be considered a separate offense, as follows:

First Violation: *The license of the premises involved* may be suspended for not less than ten nor more than forty-five (45) days;

Second Violation: *The license of the premises involved* may be suspended for a period of not less than 30 nor more than ninety (90) days;

Third Violation: The license may be cancelled; the bond may be forfeited.

ACLA 1949, Section 35-4-19:

35-4-19. *Duration and transfer of licenses.* No license shall be issued for a greater period than one year; and no licenses shall be transferred by the licensee to any other person except with the written consent of the Court, but authority for the same shall issue upon application thereto in writing.

ACLA 1949, 35-4-21 (A):

(A) Beverage dispensary licenses: (Bond; Penalties: Revocation: Employees: Existing

Licenses:)
A Beverage Dispensary license shall give to the holder thereof the right to sell or serve on the premises beer, wine and hard liquors for consumption on the premises only. Provided, however, that the premises for which such license is issued shall not be connected by doors or otherwise with premises covered by any other license issued under these regulations; and provided further, that the sales under Beverage Dispensary Licenses are limited to less than five wine gallons to any one person in any one day. A Beverage Dispensary License Fee shall be Five Hundred Dollars (\$500.00) in all towns, villages, settlements and places of population not exceeding fifteen hundred persons and One Thousand Dollars (\$1,000.00) in all towns, villages and incorporated cities having the population in excess of fifteen hundred persons and all applicants desiring a Beverage Dispensary License, at the time of filing with the District Court, (?) the applicant for such license shall also file a bond, either in cash or a surety company bond, to be approved by the Court, the condition of such bond or undertaking shall be, that the licensee or licensees are the sole owners and that no other persons are financially interested either directly or indirectly and will conduct said business in accordance with the existing laws pertaining to the manufacture and sale of intoxicating liquor in Alaska. Such bond shall be in the penal sum of Twenty-five Hundred Dollars (\$2500.00). Upon conviction for violation of the laws of Alaska pertaining to the manufacture and sale of intoxicating liquor or upon revocation of a license, said bond shall be forfeited and covered into the Territorial Treasury.

The Judge of the District Court for the Territory of Alaska is hereby empowered and authorized to revoke any license hereafter granted, as well as those now issued. Complaints for revocation of licenses under this Act shall be filed by the U. S. Attorney, his assistants or any Federal or any Territorial Enforcement Officer. Such complaints shall be filed with the Clerk of the U. S. District Court. Upon such complaint being filed, duly verified, the U. S. District Judge shall issue an order to show cause against the licensee and upon hearing the same, or upon default of the licensee, the said Judge shall issue his judgment and order in the matter.

Penalty for violation of any of the provisions of this Act shall be as follows:

For the first violation, *the licensed premises* shall be closed for a period of forty-five (45) days;

For the second violation, *the licensed premises* shall be closed for a period of ninety (90) days;

For the third violation, the bond shall be forfeited, the license cancelled and the premises abated for one year for use as a beverage dispensary.

The holder of any license which has been revoked as herein provided shall not be entitled to apply for and receive another license under this Act for a period of five years from the date of the Order of Revocation.

All employees serving intoxicating liquor in a Beverage Dispensary shall be male citizens of the United States, over the age of 21 years and of good moral character. Any such employee of such

place violating the provisions of this Act shall be equally guilty with the holder of the license and shall be punished accordingly. The Treasurer of Alaska is empowered and directed, with respect to existing licenses, to make any and all adjustments necessary by extending credit on new licenses or making refunds to the licensees for the unused portion of the licenses heretofore issued at the option of the licensee.

Provided that such beverage dispensary licensee shall be permitted to continue in operation during the period for which his present license is effective, if he shall so elect. Provided, however, such license shall not be extended to include intoxicating liquor other than beer or wine unless he first obtain a new license and post bond as provided hereinbefore.



No. 14,853

United States Court of Appeals
For the Ninth Circuit

WILLIAM V. BOGGESE, as Protestant on
behalf of the City of Fairbanks,
Alaska, and THE CITY OF FAIRBANKS,
ALASKA,

Appellants,

VS.

BERRY CORPORATION, STEVE BOINICH and
UNITED STATES OF AMERICA,

Appellees.

On Appeal from the District Court of the United States for the
District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE
UNITED STATES OF AMERICA.

THEODORE F. STEVENS,

United States Attorney,

Fairbanks, Alaska,

Attorney for Appellee

United States of America.

FILED

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BRIEF FOR APPELLEE UNITED STATES OF AMERICA.

STATEMENT OF JURISDICTION.

This appellee agrees with appellant's "Statement of Jurisdiction" so far as it describes the District Court's authority; however, this Court does not have jurisdiction to review the order appellant has appealed from.

The District Court below was acting in an administrative capacity—its order consented to the transfer of a territorial liquor license. The hearing on the

protest against said transfer was not a case or a legal controversy and the order did not amount to a final judgment under 28 U.S.C. 1291.

STATEMENT OF CASE.

Appellant's statement of the proceedings in the District Court fairly summarizes the actions of the Court in the hearing below.

ISSUES PRESENTED.

The major issue presented here is whether or not this Court has jurisdiction to review an administrative order of the district judge wherein he granted consent to transfer a liquor license.

If this Court has jurisdiction, the appellant's brief properly limits this appeal to one issue; *i.e.*, can the District Judge approve the transfer of a liquor license from one location to another in the Territory of Alaska?

ARGUMENT.

I.

THERE CAN BE NO APPEAL FROM THE DISTRICT COURT'S ORDER GRANTING CONSENT TO TRANSFER.

This Court, by virtue of 28 U.S.C. 1291, has jurisdiction to review "final decisions" of the District Court for the Territory of Alaska. While it may be

true that a District Court in Alaska is exercising a judicial function when passing upon a protest against the issuance of a license (see, *In re Alaska Labor Trades Ass'n*, 10 Alaska 472, 484 (1945)), the appeal before this Court concerns only the consent of the District Court to transfer a license already issued.

The Alaska Legislature left the Court no discretion in the matter of transfers. Section 35-4-19, A.C.L.A., 1949, states clearly:

“* * * no licenses shall be transferred by the licensee to any other person except with the written consent of the court, *but authority for the same shall issue upon application thereto in writing.*”

How the granting of consent to transfer can rise to the level of a case or controversy is difficult to perceive. It is axiomatic that the jurisdiction of a federal Court must be limited to the “claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs.” (*Muskrat v. U. S.*, 219 U.S. 346, 349 (1910). And in case, it is obvious that the only issue before the Court was whether the application for transfer was properly made. If it was, the Court was left no alternative but to consent to the application.

By imposing upon the District Court the task of reviewing, ordering the issuance of every liquor license in the Territory, and consenting to the transfers thereof, the Alaska Legislature has loaded a great

administrative burden upon the federal judges. It has also stripped a person aggrieved by the ruling of the district judge in a liquor application hearing of the usual remedies of injunction, etc. This very case is an example of the result of such an unwise decision: the liquor license in this case has been transferred; if the right to appeal exists, the remedy is entirely inadequate for the license by statute will expire at the end of one year (December 31, 1955). (35-4-19, A.C.L.A., 1949.) It has been said that the Alaska Legislature "probably has no authority to impose administrative duties upon the District Court or judge" (*In re Alaska Labor Trades Ass'n, supra*, p. 484) but such reasoning does not compel the conclusion that the Legislature did not in fact impose such a duty in this instance. Even if Congress had given the District Court of Alaska the duties set forth in the Territorial Liquor Law, it would not follow that the action of the Court is reviewable here. As a "Legislative Court" (see, *McAllister v. U. S.*, 141 U.S. 174 (1891)) the Alaska Court could be given additional administrative duties, but that does not necessarily mean that this Court, operating within the framework set up for constitutional Courts, can review a territorial administrative decision.

II.

IF THE DISTRICT COURT WAS EXERCISING A JUDICIAL FUNCTION WHEN IT CONSENTED TO THE TRANSFER, THE DISTRICT JUDGE DID NOT ABUSE HIS DISCRETION IN SO DOING.

Appellants rely upon the fact that many sections of the Alaska code refer to the "premises covered by any license", or the "premises covered by his license", to demonstrate that the Legislature intended the Court's power to consent to the transfer of a license ^{to be} ~~is~~ limited to a transfer from person to person. The license gives the licensee the privilege to sell liquor at a particular location. Upon receiving consent of the Court, the original licensee may transfer the license to another person and nothing in the liquor law requires that the transferee conduct his business upon the same premises as originally occupied by the licensee.

While procedure is set up for making application for a liquor license in the Territory, only an application in writing is required by law for consent to transfer a license once issued. Appellant contends that the Legislature intended transfers to be made only from person to person. Nothing in the law would require the conclusion that a transferee have all the personal qualifications as the original applicant—*nor does the law require the approval of the city council for a transfer from person to person.* Yet, conceding that the law authorizes a transfer from person to person, appellant argues that no transfer from place to place can be made because the city council should be permitted to pass upon the desirability of licensing the

premises. Obviously, appellant's circuitous reasoning is inherently destructive of its own position. All that the liquor statute requires of the original applicant as a showing for both "the integrity of the applicant and the desirability of the issuing of a license for the premises" is five references. (35-4-13, A.C.L.A., 1949, as amended.) The only function of the city council is to approve or disapprove *the original* application. If it fails to act, the city will lose its share of the license regardless of approval, disapproval or failure to act on the part of the city council.

Appellant also accuses the Court below of trying to fill a procedural vacuum because it referred the application for transfer to the Fairbanks City Council prior to granting its consent. There is no doubt that the Court below required the transferee to establish that he fulfilled all the requirements of an original applicant—including references attesting to desirability of licensing his premises—and referred the transfer to the Fairbanks City Council for its action. The Court was not compelled to do this, but in its discretion has demanded such a showing for the protection of the community. Whether the council refused to act because it had already received its portion of the fee for the license involved and wanted the transferee to pay for a new license is a matter of conjecture. Suffice it to say that it had approved the issuance of the license to the Berry Corporation. Its refusal to act upon the transfer did not prevent the Court from consenting to the transfer.

The Berry Corporation had prepaid its license fee for one year. The license had value at least equal to the prorated prepaid balance. Having approved the original license, there can be no question that the Fairbanks City Council consented to the existence of the license. The question is whether or not by its refusal to act upon the transfer the city council can destroy the value of the license to the original applicant or its successor in interest. This appellee submits that the opinion below speaks for itself on this issue.

CONCLUSION.

In conclusion, based on the argument set forth above, appellee submits that this Court should dismiss this appeal for the reason that it lacks jurisdiction to review the order appellant has appealed from. In the alternative, appellee requests this Court to affirm the opinion of the District Court below.

Dated, Fairbanks, Alaska,
December 7, 1955.

Respectfully submitted,

THEODORE F. STEVENS,

United States Attorney,

Attorney for Appellee

United States of America.



No. 14,853

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Appellees.

Appeal from the District Court for the
District of Alaska, Fourth Division.

APPELLANTS' REPLY BRIEF.

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PAUL P. O'BRIEN,

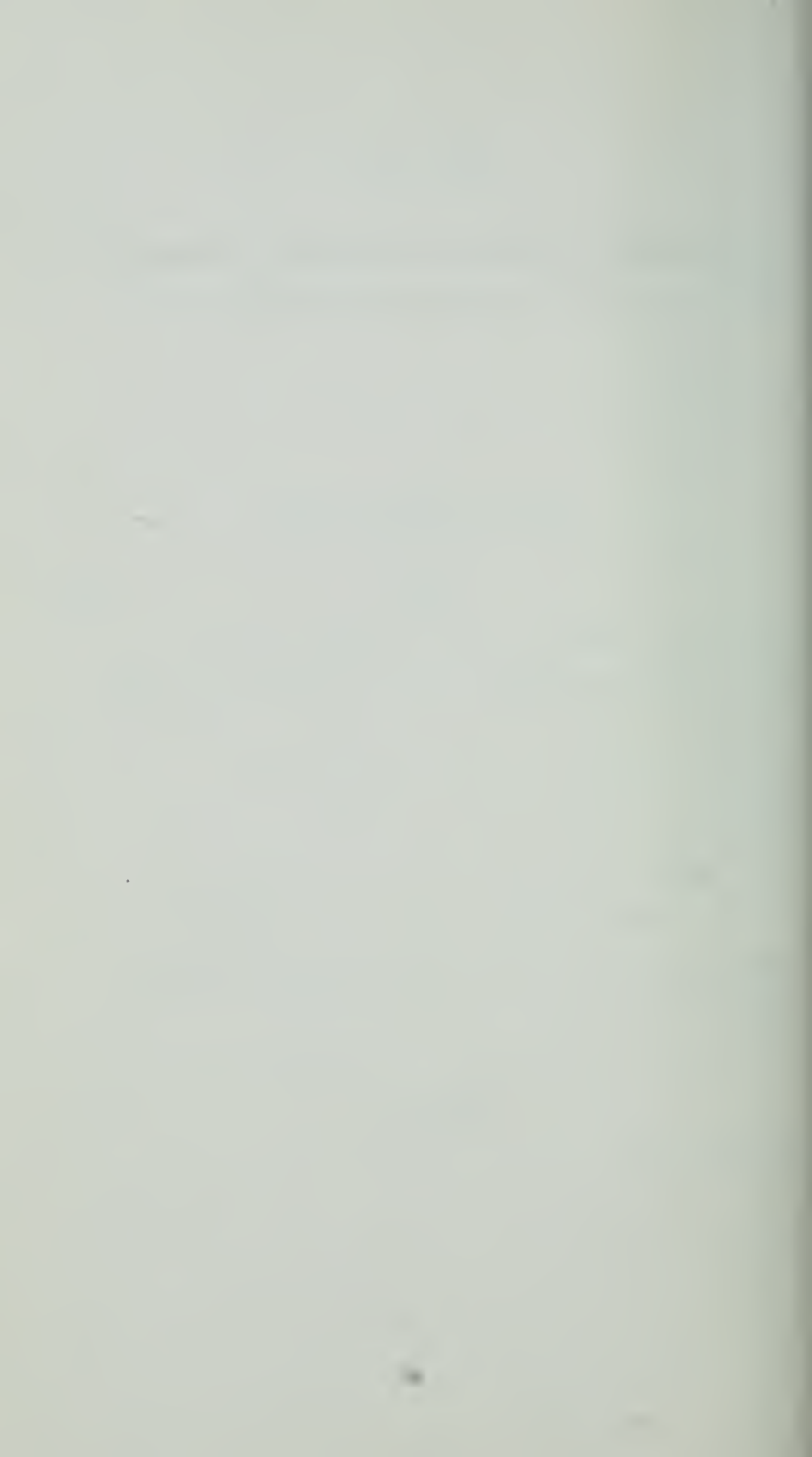


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APPELLANTS' REPLY BRIEF.

I.

**REPLY TO SECTION I OF ARGUMENT OF
APPELLEE UNITED STATES.**

The appellee United States contends, in the first section of its argument, and it may well be true, that the Court below has no discretion to refuse the transfer of a liquor license * * * that its function with reference to transfer is merely ministerial. Upon

that predicate the government concludes that this Court has no authority to review an "administrative decision."

If we assume the correctness of the predicate, the conclusion does not necessarily follow. When the Court below ordered a transfer of the subject license it judicially construed the statutory content of the word "transfer" as embracing a change of location of the licensed premises. In fact, a written opinion was rendered on that very subject. When administrative duties are delegated to a court it behooves that court to judicially determine the extent of its authority. An order issued pursuant to such duty presupposes such a determination whether express or not.

The Government's argument is hypertechnical. It is worshipping at an altar of forms or labels. It fails to recognize the difference between review of a decision or order of an administrative agency and an administrative decision of a court.

The consequences of such failure, if the Court in this case approves the Government's position, are considerable. If an administrative agency acts without or exceeds its statutory authority, an aggrieved litigant may obtain equitable relief or relief by way of extraordinary remedy by application to the District Court. A denial of that relief would, of course, be subject to judicial review by this Court. Obviously, no such remedies are available to a litigant where the District Court itself acts administratively and passes judicially on the extent of its own admin-

istrative powers. To hold such a determination not subject to judicial review by this Court is to hold that the Territorial Legislature may circumvent the jurisdiction of this Court by the simple device of administrative delegation to the District Court. This the Territorial Legislature certainly cannot do. *Hauptman v. United States*, 43 F. (2d) 86.

The authority of this Court to review by appeal the administrative determinations of the District Court of Alaska may be implied from the decisions of this Court in *Town of Fairbanks, Alaska v. Barrack, et al.*, 282 F. 417, and *Town of Fairbanks, Alaska v. United States Smelting, Refining & Mining Co., Inc., et al.*, 186 F. (2d) 126. In the former case it was held in an annexation proceeding that "creation of municipalities, and the defining of the extent of the boundaries thereof, involve the exercise of legislative, not judicial, power." In the latter case, this Court reviewed on appeal a judgment of the District Court for the District of Alaska dismissing a petition for annexation of territory by a municipality. It follows that this Court, in fact, reviewed an administrative decision as a "final decision" within the purview of 28 U.S.C.A. 1291 under the holding in the *Barrack* case that annexation is a legislative function.

Undecided to date is the collateral question of the authority of the Territorial Legislature to impose upon the District Court for the District of Alaska any legislative or administrative duties. This Court expressed doubt upon that subject in the *Barrack*

case, *supra*, and the late Judge Dimond was of the opinion that such attempted delegation would be invalid in *In re Alaska Labor Trades Ass'n.*, 10 Alaska 472.

As another facet of the first section of its argument, the appellee United States points out that the remedy of appeal "is entirely inadequate for the license, by statute, will expire at the end of one year (December 31, 1955). (35-4-19, ACLA, 1949)"

The question here involved is one of extreme public importance in the Territory of Alaska. If, as the United States contends, the District Court has the authority to transfer licenses from one location to another within the corporate limits of municipalities and, indeed, has no discretion to refuse to do so upon application therefor, then the choice of municipalities as to license location will be effectively curtailed. Such transfers will be frequently effected in order to avoid City disapproval of an original application. Indeed a City ordinance regulatory of location might be held invalid as in conflict with such absolute right of transfer. Since the question on appeal is of substantial public importance, involves the construction of a public statute, involves the extent of the authority of the court below, and may frequently arise, it is submitted that it should be decided by this Court even though it may become technically moot pending appeal. See the decision of this Court in *Boise City Irrigation & Land Co. v. Clark*, 131 F. 415. Also *Van de Vegt v. Larimer County*, 98 Colo. 161, 55 P. (2d) 703.

Another reason for determination of the question on appeal lies in the very inadequacy of the remedy of appeal as stated by the Government. Where a matter is of public interest and it is difficult to obtain a determination thereof prior to its becoming moot, it should be determined on appeal. *Close v. Southern Maryland Agri. Asso.*, 134 Md. 629, 108 A. 209, and *Doering v. Swoboda*, 214 Wis. 481, 253 N.W. 657.

II.

REPLY TO SECTION II OF ARGUMENT OF APPELLEE UNITED STATES.

With reference to the second section of the argument of the appellee United States, the question on appeal is not whether or not the court below abused its discretion by consenting to the transfer of the appellee Boinich's license from location to location as stated, but whether or not it had any authority to do so. Particularly is this true if the court below acts ministerially in approving such transfer. Both the United States and the court below conclude that "nothing in the liquor law requires that the transferee conduct his business upon the same premises as originally occupied by the licensee." Such reasoning is negative. It is an attempt to justify an act as authorized because there is no prohibition against it. As is evident from the Government's brief and the action of the court below, this authority produced

from vacuum requires the creation of a procedure to effectuate it.

Dated, Fairbanks, Alaska,
December 14, 1955.

Respectfully submitted,
WILLIAM V. BOGGESS,
Attorney for Appellants.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

EARL WEST, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA

BRIEF FOR THE UNITED STATES, APPELLANT

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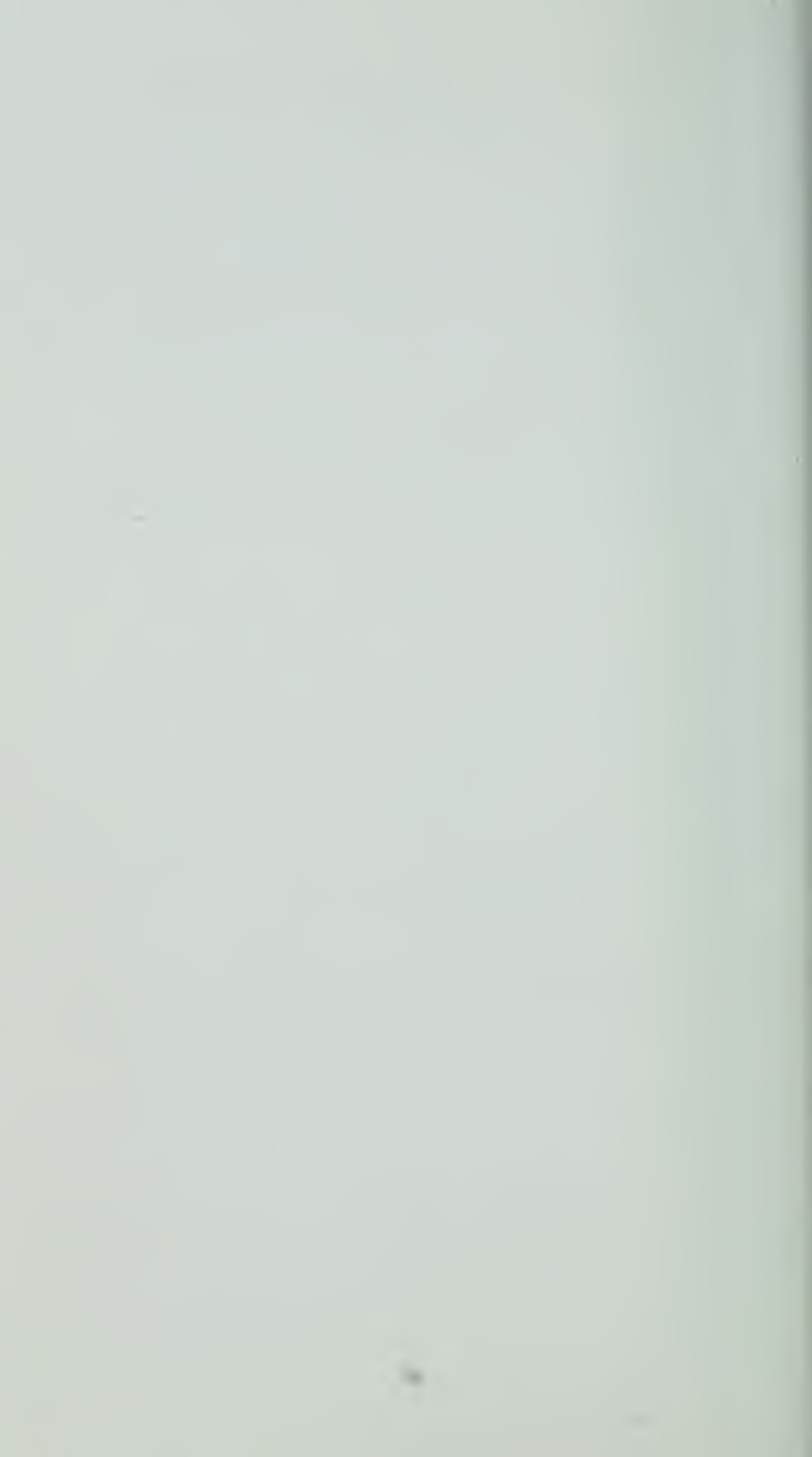
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14854

UNITED STATES OF AMERICA, APPELLANT

v.

EARL WEST, ET AL., APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA*

BRIEF FOR THE UNITED STATES, APPELLANT

OPINION BELOW

The district court wrote a memorandum opinion which appears at R. 26.

JURISDICTION

The jurisdiction of the district court was invoked by the United States as plaintiff under 28 U.S.C. sec. 1345. The judgment of dismissal was entered March 23, 1955 (R. 35). Notice of appeal was filed May 18, 1955 (R. 36). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the Tribal Council of the White Mountain Apache Indian Tribe has the power, by virtue of its con-

stitution and duly enacted and approved ordinance, to exclude white men from grazing on the ranges within the borders of the White Mountain Apache Indian Reservation, and to regulate grazing by members of the Tribe.

STATEMENT

This action was instituted on May 19, 1954, to enjoin appellees, Earl West and his family, from grazing livestock on tribal lands in the White Mountain Apache Indian Reservation, Arizona. The land belongs to the United States and is held in trust for the Tribe. The facts, as brought out at the trial, leading up to the filing of the complaint are as follows:

On August 15, 1938, the White Mountain Apache Tribe, in accordance with Section 16 of the Wheeler-Howard Act, 48 Stat. 984, 25 U.S.C. sec. 476, adopted a constitution and by-laws (R. 41-55). This constitution in Article VIII makes the following provision relative to tribal lands:

The general control of the reservation lands and other tribal property shall continue as heretofore, until changed in any particular by ordinance. The reservation land now unallotted shall remain tribal property and shall not be allotted to individuals in severalty, but assignment of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject, provided the vested rights of members of the tribe are not violated. Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances.

On August 3, 1953, the tribal council enacted an ordinance known as Ordinance No. 22 which was approved by the Superintendent of the Fort Apache Agency and the Assistant Secretary of the Interior. It became effective August 7, 1953 (R. 10-17). Article I of the Ordinance provides for the establishment of grazing districts in the reservation. In each of these districts grazing associations may be formed by the people in the districts and grazing permits will be issued only to members of the associations. Penalties for grazing without proper permit are provided by Article II (R. 14).

Article III of this Ordinance provides in part (R. 15):

This ordinance shall apply to all lands within the Fort Apache Indian Reservation as defined in Article I of the Constitution of the White Mountain Apache Tribe of the Fort Apache Indian Reservation, approved August 26, 1938, *Provided*, That the rights accruing to members of the Tribe under Article VIII of the Constitution are not hereby jeopardized or abrogated in any way, and *Provided Further That*, right of occupancy of reservation lands shall not include exclusive grazing privileges or rights not otherwise provided by this ordinance and nothing in this ordinance shall affect adversely the rights of individuals to their home sites or dwelling places.

Article III then provides the procedure for assertion of claims as to improvements. Appellee, Earl West, has grazed livestock on some 30,000 acres of tribal land within the Fort Apache Indian Reservation, Arizona, since about 1923. West is not an Indian but is married

to appellee Elsie Amos West, who is a member of the White Mountain Apache Tribe. The remaining appellees, their children, are either enrolled members of the Tribe or eligible for enrollment (R. 30). Earl West being a non-Indian is not eligible to apply for membership in a livestock association as contemplated by Article I of Ordinance 22. His wife and children (other than the two who are minors) are eligible to apply but have not done so (R. 33). Since appellees continued to graze this portion of the reservation contrary to this Ordinance, the present suit was brought to enforce the Ordinance and to enjoin such grazing.

The case came on for trial on December 3, 1954. At the trial Mr. Moore, a former stockman on the reservation, and Mr. Donner, former superintendent of the reservation, testified regarding the meetings between West and officials of the reservation in which West was permitted to locate on portions of the reservation. The principal meeting was in 1936. Mr. Donner testified under cross-examination that "there was nothing permanent about giving any one man certain acreage he could keep regardless of the number of people in the tribe, nobody expected that" (R. 125). West and his family testified regarding certain improvements he had made on the range (R. 132). He also testified that the cattle belonged to him and his wife and that the children owned some of the cattle individually although they carried the brand listed in his name (R. 139).

At the trial the Government introduced two witnesses, John Crow, present superintendent of the reservation, and Joe A. Wagner, a range conservationist with the Bureau of Indian Affairs. Mr. Crow testified that West was grazing on this land against the wishes of the tribal

council (R. 81) and that in the summer of 1953 West met with the council to work out some arrangements regarding his grazing on tribal property. At this meeting West offered to move if the council would buy him a ranch of comparable size outside the reservation and, in the alternative, he asked that members of the tribe of less than full blood be allowed to form their own grazing associations. The council refused both suggestions (R. 69-70, 85). It was after this meeting that letters were directed to West requesting him to show what right he had to graze cattle on the reservation. Mr. Crow testified that the range was in very poor condition and when he saw the condition of the range and the poor condition of the cattle he of his own volition impounded the cattle (R. 96).

Joe A. Wagner, a range conservationist, testified that he was familiar with the range involved here, that the range was in poor condition and that in 1952 he had recommended nonuse of the area for five years.

At the conclusion of the trial the court entered a memorandum opinion in which it states that the Wests had acquired rights within the meaning and protection of Article VIII of the tribal constitution and "Such rights may be modified by the tribal council, as the superintendent might have modified them, to accommodate the needs and interests of other families on the reservation, but they could not be entirely abrogated except for a compulsory membership in a livestock association" (R. 26). On March 23, 1955, the court entered its findings of fact and conclusions of law and entered judgment dismissing the complaint (R. 27). This appeal followed (R. 36).

STATEMENT OF POINTS TO BE RELIED ON

1. The district court erred in interpreting that provision in Article VIII of the Constitution of the White Mountain Apache Tribe which protects "rights of occupancy of long established allocations" to allow a non-Indian to enjoy exclusive grazing privileges on tribal lands.

2. The district court erred in holding that Ordinance No. 22, duly enacted by the tribal council, is ineffective regarding the rights in tribal lands to be enjoyed by a non-Indian.

3. The district court erred in entering judgment of dismissal of the plaintiffs' complaint.

ARGUMENT

The Council of the White Mountain Apache Indian Tribe Was Authorized to Exclude White Men From Grazing on the Reservation

It must be assumed that Mrs. West and the West children may, if they wish, become members of the livestock association. The district court recognized that the alleged "right" might be abrogated in exchange for a compulsory membership in a livestock association. Its holding was, therefore, that West's right could not be so abrogated since he was ineligible to join the association and that this fact rendered the Ordinance invalid as to the entire West family. We shall show first that limitation of this use of the reservation to Indians was perfectly permissible, and second, that regulation of grazing upon the reservation through the association's process was an appropriate means of dealing with the problem.

A. The use of the tribal lands was properly limited to members of the tribe.—Earl West has no possible claim

to grazing rights, exclusive or otherwise, under the Federal Constitution. Article VIII of the Tribal Constitution does not help him since it protects "the vested rights of members of the tribe * * *." Limitation of the benefits of the tribal property to members of the tribe is obviously reasonable. And, of course, Mrs. West and the children have their rights, which they have not exercised, to enjoy the tribal property through membership in the association. Certainly this white man can not indirectly secure the benefits of tribal membership simply by marriage to an Indian, which seems to be implied in Conclusion of Law No. 3 that all of the property of Earl and Elsie West is community property. At most that fact would give Earl West only a share in Elsie's tribal interest and not a right to reject tribal control of its property. The district court thus plainly erred in holding that Earl West possessed any right in this property owned by the Indian Tribe. Certainly, West had no greater rights than Indian members of the tribe and, as we shall now show, the tribal regulations of grazing were perfectly proper as applied to members of the tribe.

B. *The tribal grazing regulations are perfectly proper as applied to members of the White Mountain Apache Indian Tribe.*—The lands here involved, are within the Fort Apache Indian Reservation and have been "reserved for the use and benefit of the White Mountain Apache Tribe" (Fdg. 1, R. 28). The purpose of establishment of the tribal organization under the Wheeler-Howard Act was primarily to regulate the use of the tribal property in the interests of all of its members. It is clear that no individual had a right in such property which would be protected by the Fifth

Amendment of the Federal Constitution, merely because he had been permitted to use the property for grazing or other purposes in the past. Such use could not, under any view, attain a greater dignity or protection than the implied license arising from the similar use of public domain. Prior to the passage of the Taylor Grazing Act, 48 Stat. 1269, cattlemen had an implied license to graze their cattle upon the open and unreserved public domain. *Buford v. Houtz*, 133 U.S. 320, 326 (1890). This implied license, however, was not a property right. As the court stated at page 326 this license existed only if no "act of government forbids this use." The Supreme Court in a later case, *Omaechevarria v. Idaho*, 246 U.S. 343, 352, states "Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used;" citing *Buford v. Houtz*, *supra*. And, in the *Omaechevarria* case (246 U.S. at page 352), the Supreme Court points out that, because the citizen possesses no such property right, the license can be withdrawn or revoked by the Government. Citing *United States v. Grimaud*, 220 U.S. 506 (1910), and *Light v. United States*, 220 U.S. 523 (1910). Congress did revoke the license by the passage of the Taylor Grazing Act. And licenses issued under that Act do not create vested rights in the federal grazing lands. *Osborne v. United States*, 145 F. 2d 892 (C.A. 9, 1944); *Oman v. United States*, 195 F. 2d 710 (C.A. 10, 1952).

Thus, the only possible basis for a claim to a vested right to graze on the reservation is the Tribal Constitution. Ordinance No. 22 is, of course, premised upon the understanding that grazing rights arising merely

from previous use are not vested rights within the meaning of the Tribal Constitution and Article III expressly so states, *supra*, p. 3). The appropriate officials of the Department of the Interior approved this Ordinance, thereby agreeing with the interpretation of the Tribal Council. This construction should, we submit, conclude the matter.

Moreover, the council's construction of the Tribal Constitution was clearly correct. Article VIII refers to "Right of occupancy of long established allocations or dwelling places and improvements * * *" (*supra*, p. 2). This is the normal language by which to refer to the allotment of areas continuously occupied as homes, or as farms and gardens and not to vast areas used for grazing. The fact that, almost contemporaneously, the Federal Government in attacking the problem in the Taylor Grazing Act refused to recognize vested rights in any particular area further confirms the council's construction. A conclusion that grazing rights are within the scope of Article VIII would largely nullify any control of grazing since, as is well known, the great problem of recent years, has been overgrazing. For this reason, the Secretary of the Interior has promulgated grazing regulations by authority of Section 6 of the Wheeler-Howard Act, Stat. 984, 986. Section 71.4 of these regulations, 25 C.F.R. 71.1 *et seq.*, states that they would be effective on any Indian lands under the jurisdiction of the Bureau of Indian Affairs except when they were superseded "by special instructions to particular reservations or by provisions of any tribal constitution, bylaws, heretofore or hereafter ratified, or any tribal action authorized thereunder." Section 71.4 establishes divisions of the reservation into

grazing units and section 71.9 recognized that grazing associations may be formed and free grazing privileges are accorded such associations.

It is unreasonable to construe this particular constitution to exclude this generally acceptable regulatory process. The usual problem was here present. At the trial government witness Wagner testified that in 1952 when he inspected the area involved here he recommended nonuse of the range for five years (R. 103). The general area had suffered from drought for some time and forage on the range was sparse. Mr. Wagner testified that the range was in poor condition (R. 102). Clearly some control of the range was necessary.

It is not for the court to attempt to solve the problem in another way by saying that, although vested, the grazing rights might be modified "to accommodate the need and interests of other families on the reservation" (R. 26-27). If rights are in truth vested within the meaning of Article VIII they cannot be modified and, of course, the court may not amend the Constitution. We submit that this grazing situation fits exactly the provision of Article VIII that "assignment of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject * * *." The claim arising from the making of improvements was recognized by the tribe and provision for the settlement of any claim which any member might have against the tribe is provided for in paragraph 2 of Article III. This paragraph provides that settlement of the claims shall be negotiated between the member and the council. If settlement is impossible at this level the matter would be referred to the Department of the Interior. Thus, any valid claims that the

West family as members of the tribe may have are protected by Ordinance No. 22.

CONCLUSION

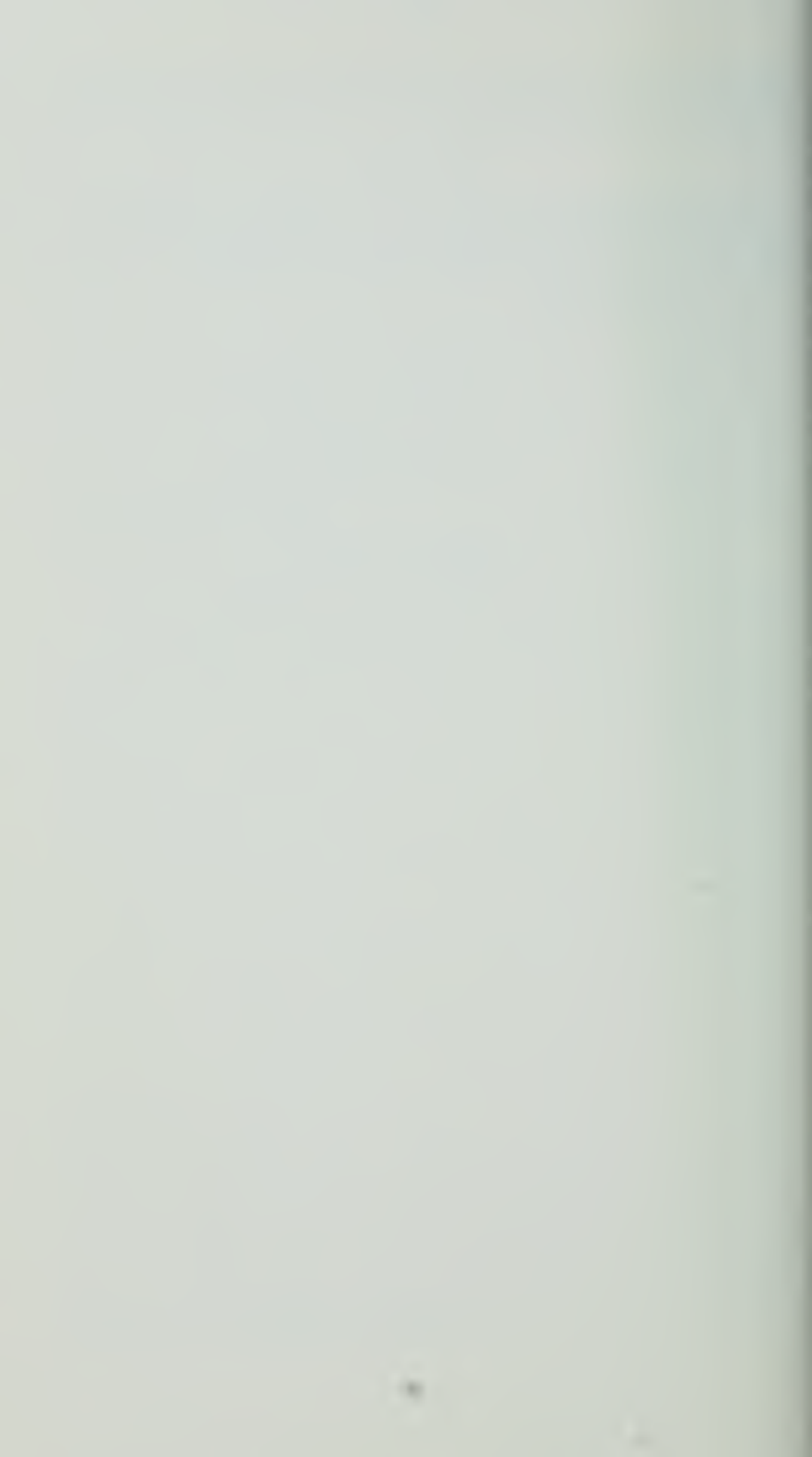
For the foregoing reasons it is submitted that the decision of the district court should be reversed.

Respectfully,

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 JACK D. H. HAYS,
United States Attorney,
Phoenix, Arizona.

ROGER P. MARQUIS,
 REGINALD W. BARNES,
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DECEMBER, 1955.



**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

EARL WEST, ET AL., APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA*

BRIEF FOR THE APPELLEES

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In the United States Court of Appeals for the Ninth Circuit

No. 14854

UNITED STATES OF AMERICA, APPELLANT

v.

EARL WEST, ET AL., APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA*

BRIEF FOR THE APPELLEES

JURISDICTION

The appellant has correctly stated the jurisdictional matters in reference to the jurisdiction of the District Court as well as the jurisdiction of this Court.

QUESTIONS PRESENTED

The question presented is not whether the Tribal Council of the White Mountain Apache Indian Tribe has the power to exclude white men from using the range within the border of the reservation for grazing, nor is the question the right of the Council to regulate grazing by members of the Tribe.

The questions to be determined in this case are:

1) The interpretation and application of Article VIII of the Tribal Constitution.

2) Did the defendants have vested rights or rights of occupancy of long established allocation which Ordinance 22 (R 17) was ineffectual to change or abrogate?

3) Do those rights include grazing privileges as well as dwelling places and improvements?

STATEMENT

The statement of the facts in this case can best be made by referring to the findings of fact (R 27-34).

In 1872, one Corydon Cooley, a white man, married an Apache Indian and shortly thereafter began raising cattle in the vicinity of McNary and Pinetop territory of Arizona, or what is now a part of the Indian Reservation. In 1894, their daughter, Bell Cooley, married a white man named Ambrose Amos who settled in the vicinity of Big Spring (which is the same vicinity where defendants were grazing their cattle). Elsie West, the wife of Earl West, both defendants in this case, is the daughter of Bell Cooley and Abraham Amos. Earl West and Elsie Amos, now Elsie West, were married in 1922 and ever since have been husband and wife, and they have grazed cattle on the Apache Indian Reservation since 1923 and their children, the other defendants in this case, have owned and grazed cattle on the reservation for several years prior to 1953.

In 1926, the then superintendent of the reservation gave permission to the Amos and the West families to graze cattle on part of the reservation near Big Spring where they were grazing cattle at the time they were seized by the superintendent of the reservation.

In 1936, William Donner, then superintendent, gave permission to the West family, including all of the defendants then alive, to graze cattle on that part of the reservation near Big Spring. At that time, the defendants surrendered part of the range and in lieu thereof superintendent Donner gave permission for them to graze cattle on another part of the reservation north and west of Highway 60 (R 32).

Since 1924, the defendants have made valuable improvements on the premises near Big Spring and west of Highway 60, consisting of dwelling houses, fences, wells and water tanks. And, since 1926, the defendants and the Amos family are the only ones who have regularly run cattle in that area up to April of 1954.

In April of 1954, the superintendent of the reservation seized and removed from the premises, where they had been grazing, all of the cattle belonging to the defendants and removed them to another part of the reservation and retained possession thereof until after the judgment in this case in the District Court; at the time of the seizure and removal of the said cattle, no process or orders had been issued from any Court or from any department of the Government.

The Constitution of the White Mountain Apache Tribe was adopted and approved in August of 1938. A pertinent part of this Constitution is Article VIII (R 50), which for ready reference we deem advisable to set out in full:

“The general control of the reservation lands and other tribal property shall continue as heretofore, until changed in any particular by ordinance. The reservation land now unallotted shall remain tribal property and shall not be allotted to individuals in

severality, but assignment of land for private use may be made by the Council in conformity with ordinances which may be adopted on this subject, provided the vested rights of members of the tribe are not violated. Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances.”

In August of 1953, the Tribal Council passed Ordinance 22 (R 10-17). The provisions of this Ordinance which the appellants rely upon as justification for the removal of the defendants’ cattle are set out at Page 3 of the Appellant’s Brief.

ARGUMENT

Article III of Ordinance 22 (R 15) which attempts to provide that “right of occupancy of reservation lands shall not include exclusive grazing privileges or rights not otherwise provided by this Ordinance ***” is clearly in violation of Article VIII of the Constitution. This is made clear by the interpretation of Article VIII by the Department of Interior itself as expressed in a letter of the Assistant Secretary, Exhibit 6 (R 87-89). The Department refused to approve an Ordinance which was submitted at that time giving the following reasons:

“It might be desirable also to suggest to the tribal council that any *grazing ordinance* which it may adopt must take into account the provision of Article VIII of the tribal constitution, which contemplates that long-established rights of occupancy and improvements shall be protected. The record indicates that there are at least two families on the reservation — the West family and the Amos family — who might be adversely affected by the

adoption of a *grazing ordinance* such as that under consideration, which limits the issuance of grazing permits only to livestock associations. As it is not clear from the present record whether established rights of occupancy and improvements would be protected by the proposed ordinance, a full report on this aspect of the situation should be made.” (Emphasis supplied.)

This quotation clearly shows that the drafters of Article VIII and the Department had in mind no intention of limiting the right of the parties to mere residences on the reservation but that grazing rights were also protected.

It is also our contention that Paragraphs f, g, h, and i of Ordinance 22 (R 13) have application only to that part of the reservation upon which grazing permits have been issued to stock associations.

The Court held, as a matter of law (R 34), that Ordinance No. 22 of the White Mountain Apache Tribe is ineffectual to change or abrogate the rights of the defendants on the reservation land. We respectfully submit that this is the correct statement of the law and the proper interpretation of the Constitution.

The attempt of the appellant to draw an analogy between the situation here and under the Taylor Grazing Act is without merit. Article VIII of the Constitution makes the difference and marks the distinction between the two situations.

In attempting to put a strained interpretation on Article VIII, appellant is asking this Court to destroy and strike out part of the Article. If, in drafting Article VIII, it was intended to exclude the rights of grazing

from the protected rights, it would have been a simple matter to have so limited the protection. Appellant is asking this Court to give no meaning whatsoever to the phrase "rights of occupancy of long established allocation."

The question of over-grazing is not an issue. The right of appellees to use the land in question for grazing dates back to 1923 and for two generations before that time. That anyone with that background and experience would deliberately destroy his range by over-grazing is unbelievable. The testimony of witness Wagner (R 100) is but an opinion and evidently not taken seriously by the Court as there is no finding on that question.

The right of residence and improvements and the grazing rights are so interwoven that to destroy one is to destroy the value of the others. The appellant's interpretation of Article VIII would completely remove the protection which it intended to give.

The last page of Appellant's Brief discusses the minute entry ordering judgment in favor of the defendant (R 26-27). We agree with the appellant's reasoning that it is not for the Court to solve the Government's problems by determining in this case how the rights of defendants might be modified. Certainly it is not the province of this Appellate Court to make such a determination. If there is a way that the Department might modify the rights of the defendants, it certainly is not to be done in the manner attempted in this case. Until that problem is solved properly, the defendants could not be guilty of trespass as charged in the Complaint.

At the very outset of the argument (Appellant's Brief, P 6), appellant's Brief is in error in stating that the trial court's holding was to the effect that because West was a white man and could not join the association, the Ordinance was invalid as to the entire family. There was no such finding or conclusion by the trial court.

All of the property involved, including the cattle, belonged to members of the Tribe. Mrs. West lost none of her rights by marrying a white man (25 U.S.C. 182). The trial court took judicial notice of the community property law of the State of Arizona. Under that law, Mrs. West had such a title and interest in the property as to entitle her to the same rights as any other member of the Tribe.

Appellant also argues in the latter part of the Brief (P 10) that our remedy is by making a claim under the provisions of Paragraph 2, Article III of Ordinance 22 (R 16).

If Ordinance 22, in any manner, affects defendants' rights, then the Government should have invoked the provisions of the Ordinance before taking the arbitrary action which was taken in this case by Agent Crow.

We were summarily notified to remove our cattle from the reservation. When we failed to comply, the cattle were arbitrarily seized. We can find no provision in the Constitution or in any ordinance justifying such action. At no time did the Government, or its Agent, Superintendent Crow, recognize any rights of the defendants but deliberately set out to destroy them financially without the slightest indication that any consideration whatsoever would be given to the im-

provements or to their right of long established allocation. The Government now says that we must go before the very people and the Department that would destroy us and let them determine our rights.

We repeat, we do not believe it is for this Court, in connection with this appeal, to determine the procedure which should have been, or should now be followed.

All this Court is asked to decide is whether the trial court was right in determining that we were not guilty of trespass. Under the facts and applicable law, we do not see how the Court could have come to any other conclusion.

We respectfully submit that the judgment of the District Court should be affirmed.

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**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

vs.

EARL WEST, ET AL, APPELLEES

*Appeal from the United States District Court
for the District of Arizona*

APPELLEES' MOTION FOR REHEARING

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**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

vs.

EARL WEST, ET AL, APPELLEES

*Appeal from the United States District Court
for the District of Arizona*

APPELLEES' MOTION FOR REHEARING

Appellees respectfully request and petition this Court for a rehearing of this cause on the following grounds and for the following reasons:

The Court erred in its interpretation of Article VIII of the Tribal Constitution, and particularly in the following clause:

“Right of occupancy of long established allocations or dwelling places and improvements made by individuals or families on tribal lands shall be confirmed by the Council through appropriate ordinances.”

The Court, in limiting the application of the foregoing clause to dwelling places and improvements, ignored the words, “right of occupancy of long established allocations.” The Court ignored the testimony of Agent Donner (A R 121) who testified that Article VIII was adopted particularly to apply to those on the reservation in a situation similar to that of the Amos and West families.

The Court ignored the interpretation placed upon the Article by the Department of Interior, as evidenced in a letter of Assistant Secretary of the Interior (A R 98).

The Court erred in giving force and effect to that part of Ordinance No. 22, which attempted to interpret Article VIII of the Constitution so as to exclude from the right of occupancy exclusive grazing privileges "or rights not otherwise provided by this Ordinance."

The Court erred in not recognizing the rights of appellees which they acquired long before the adoption of Article VIII or Ordinance 22, and at a time when any member of a tribe could have acquired the right to range his cattle on a designated area of the reservation.

That part of Article VIII, above quoted, was not meant to indicate the remedy by which these appellees, or anyone in their situation, were to be reimbursed for improvements. The word "confirmed" refers to the rights and not to the remedy. Even if we were to concede that Article VIII was meant only to provide a remedy for those who placed improvements upon reservation lands, Ordinance 22 attempts to enlarge upon and qualify the provisions of the Constitution by saying that in giving consideration to such claims, the Council shall have the right to take into account the authority under which the claimant operated in placing such improvements and the unamortized value of the improvements in view of the length of time used together with the use-value of the Tribal land during

NOTE: Numbers following the letters A R refer to pages of the Abstract of Record.

tenure by the claimant. If the Tribal Council can, by an ordinance, interpret the provisions of the Constitution so as to practically emancipate it, then the Constitution has no force or effect as such. It seems clearly apparent that Ordinance 22 was a deliberate attempt to destroy the effect of Article VIII and to deprive appellees of their rights under that article for an adequate reimbursement for their extensive improvements. There is not one item in the Constitution, or in the history of its adoption, which would indicate that such was the intention of those who drafted it.

The Court, in its opinion, refers to the "permission gratuitously granted by the Superintendent." The action by the Superintendent was not a gratuity. All the Superintendent did was to recognize rights that had existed for some time and that had been acquired prior to the granting of control of the range to the Tribe. In that respect the situation is distinguishable from those arising under the Taylor Grazing Act and we humbly submit that the cases interpreting or applying that Act are not applicable.

Article VIII of the Tribal Constitution distinguishes the two situations. When the Tribe was given the right of self-government and control of the reservation land it acquired the right and authority to do what it did by adopting Article VIII and the Tribe is now bound by its Constitution and any attempt to amend, construe or vary its terms by ordinances is unconstitutional.

The amount of land which is being used by appellees should not enter into a determination of their rights. This Court has no knowledge or information upon

which to base a comparison of the land involved with the rest of the reservation. The appellees' rights are based upon Article VIII. If the Tribe had the right and power to adopt the Constitution, and there can be no question on that point, then the Tribe had the right to recognize appellees' rights which they did in Article VIII.

The appellees, relying upon their rights, as recognized by Article VIII, invested large sums of money in improvements. We cannot conceive that the Tribe has the right to destroy all this by merely saying, "You are now trespassers."

It was never contemplated by the terms of Article VIII that those in the position the appellees are in should be required to pay for the use of the land. Such a contention is so obviously unfair that it could not have been the purpose of those responsible for Article VIII; and this Court should not give its approval to that part of Ordinance 22 which is clearly unconstitutional.

Whatever the right the Tribe, or the Government, has to put the appellees off the land they are now using, there must be a more orderly and equitable way to establish those rights than by trespass action and a summary seizing of all the cattle belonging to appellees. Without Ordinance 22 there would be no trespass and if Ordinance 22 is unconstitutional, as we contend, then there can be no trespassing.

We, therefore, respectfully submit that the judgment of the District Court should be affirmed.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that in his judgment the foregoing Motion for Rehearing is well founded and meritorious and that it is not interposed for delay.

FRANK E. FLYNN

Attorneys for Appellees

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

vs.

EARL WEST, ET AL, APPELLEES

*On Appeal from the Judgment of the
United States District Court for the District of
Arizona*

APPLICATION FOR STAY OF ISSUANCE OF MANDATE

In the event this Motion for Rehearing should be denied it is the purpose and desire of Appellees to apply to the Supreme Court of the United States for the issuance of a Writ of Certiorari and for that reason application is hereby formally made for a stay of the issuance of mandate by this Honorable Court, pending the presentation and determination of such Petition for Writ of Certiorari.

FRANK E. FLYNN

Attorney for Appellees





